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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1712

IN RE

GRAND JURY SUBPOENA SERVED UPON

SIMON HOROWITZ

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit (Appendix A, pp. 1a-28a, *infra*), is not yet reported. The Order of the United States District Court (Hon. Milton Pollack) enforcing the subpoena as modified is attached hereto as Appendix B, pp. 29a-30a, *infra*. Judge Pollack delivered an oral opinion at the conclusion of the hearing held on April 9, 1973. (Appendix E, pp. 89a-91a, *infra*).

JURISDICTION

The opinion and judgment of the Court of Appeals was filed on June 8, 1973. The Court's opinion extended the stay of enforcement of Judge Pollack's order "for ten days from the filing of this opinion

and if an application for a further stay is filed with the Supreme Court within that period, until the determination thereof".[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Does this Court's decision in *Couch* v. *United States,* 409 U.S. 322 (1973), eliminate privacy as a constitutional policy interest underpinning the Fifth Amendment, so that after *Couch* the Fifth Amendment is unavailable to the owner of personal records who places them in a location especially selected to preserve the privacy and confidentiality of those records?

STATEMENT

This case concerns a grand jury subpoena served on Mr. Simon Horowitz on July 28, 1972. (Appendix G, p. 119a *infra*) requiring him to produce

> the contents of all three file cabinets at 248 Lorraine Avenue, Upper Montclair, N.J., Office # 4.[2]

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[1] Simultaneously with the filing of this petition for certiorari, petitioners have filed an application to the Circuit Justice for an extension of the Court of Appeals' stay until the disposition of the petition for certiorari and, if granted, the decision on the merits. In our application we point out that if the Court acts on this petition before the end of this Term and directs argument on the case at the start of the next term, the case can be resolved with no delay due to the intervening summer recess.

[2] Mr. Horowitz, petitioners' accountant, initially received a subpoena *duces tecum* dated July 26, 1972 requiring his appearance and production of enumerated categories of documents (Appendix H, pp. 120a-121a, *infra*). After testifying, he was served with the subpoena which is the subject of this petition.

The grand jury in the Southern District is investigating allegations of interstate transportation of alleged proceeds of fraud. In

Located in the described file cabinets are, *inter alia*, the personal records of Alexander and Elizabeth Kasser, petitioners herein. (Appendix F, pp. 95a-118a, *infra*).

The records in question were placed in the office located at 248 Lorraine Avenue at Dr. Kasser's direction for the purpose of concealing them from Canadian authorities after those authorities seized the records of a Canadian Company in Canada. Appendix C, pp. 36a-38a, 58a-59a, *infra*.[3] The office was located by both

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the District Court the Government made an incredible series of allegations including the assertion that the Manitoban authorities had developed evidence of "fraudulent siphoning" of $20,000,000.00. Not a single shred of evidence was introduced to support this fantastic claim and petitioners below filed a lengthy rebuttal to the unsupported allegations in which they pointed out, *inter alia*, that the legality of the Manitoban expropriation is the subject of lawsuits pending with the companies in the project, in Winnipeg and New Jersey, and in the two years the New Jersey suit has been pending, the Canadian authorities *have never alleged fraud against any of the defendants therein.*

Petitioners recognize these factual matters are irrelevant to their application and Petition; we repeat them herein only because the Government has consistently repeated its twenty million dollar siphoning charge on a completely hearsay and unsubstantiated basis picked up from the domestic polities of Manitoba.

[3] Appendix C is the transcript of the hearing held before Judge Pollack on March 28, 1973 on petitioners' motion to quash the subpoena.

Petitioners' decision to hide the records from the Canadian authorities was preceded by the armed seizure of the forestry project site in the evening of January 8, 1971 by the Province of Manitoba under authority of an *ex parte* order secured without notice to the owners of the property. The seizure was based on a claim of default on interest payments due, the validity of which claim is the subject of suits pending in New Jersey and Manitoba against the Government Corporation sponsoring the project and the officials of the New Democratic Party who engineered the seizure after the Conservative Party of Manitoba was ousted in

Dr. Kasser and Mr. Horowitz and Dr. Kasser saw it and approved it. (*Id.* p. 39a *infra.*) The office was then rented in the name of Mr. Joel Mallin, a New York attorney.

The records in question were moved to the Lorraine Avenue location from the offices of Technopulp, Inc. at 26 Park Street (*Id.* 38a), Petitioners' home (*Id* 44a), the home of Michael Kasser (Petitioners' son) (*Id.* 13a) and Mr. Horowitz's office (*Id.* 40a). Regarding the presence of some of the records in Mr. Horowitz's office at the time of the Canadian seizure triggering the decision to move the records, Mr. Horowitz testified that such records were only in his office on a temporary basis when necessary for an I.R.S. audit (*Id.* 40a), that no records were ever maintained permanently in his office (*Id.*), and that his normal routine prior to relocation of the records was to go to Technopulp's offices when he needed access to the records for tax preparation purposes. (*Id.* 40a-41a).

Mr. Horowitz also testified that many of the records which were placed in the Lorraine Avenue office were "personal records that had nothing to do with my work as an accountant, which I was given for safekeeping" (*Id.* 42a):

> Q. Were they financial records or were they of a testamentary character or some other personal character?
>
> A. They were records of a testamentary character; they were records of a personal nature.
>
> Q. What personal nature?
>
> A. Well, if I got a file of Dr. Kasser's was given to me and he said, 'Keep this for safekeeping, it's my personal file'—

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an election pivoting around the Conservatives' sponsorship of this project. The seizure of the project was followed a week later by the forcible seizure of Canequip's records under a warrant secured by the Royal Canadian Mounted Police.

Q. But what was in those personal files?
A. I don't know.
Q. Other than material relating to social correspondence or family matters?
A. There were files there that I didn't even know what was in it. I mean, they were a personal file and given to me for safekeeping.
Q. Didn't you utilize those files in the course of your professional work?
A. Not all of them.

Mr. Horowitz further testified that both he and Michael Kasser had keys to the Lorraine Avenue premises (*Id.* 34a-35a), that he had one key to the file cabinet itself and another key was kept in the desk at the Lorraine Avenue office (*Id.* 54a-55a) and that he did some of his work at the Lorraine Avenue office (*Id.* 55a).

Concerning petitioner's personal records, Horowitz had restricted access only to those documents necessary to the performance of his accounting functions (*Id.* 42a-43a, 70a-71a) and when many of these records were given to him, Dr. Kasser instructed him to "keep this for safekeeping, it's my personal file". (*Id.* 42a). Finally, the Kassers have transferred their own home in New Jersey to their son, Michael Kasser, and left the United States. (*Id.* 63a).

After service of the subpoena on Mr. Horowitz in July, 1972, an agreement was reached with the U.S. Attorney's office whereby the file cabinets containing the records were promptly transferred to the U.S. Attorney's office on the understanding that Mr. Horowitz would have the opportunity to examine and inventory the documents contained therein and that he would turn over all corporate records to the grand jury but the personal records of the Kassers would

remain in the file cabinets until the Kassers had an opportunity to assert their constitutional privileges with respect thereto.[4]

Petitioners subsequently moved to quash the subpoena served on Mr. Horowitz on the grounds, *inter alia*, that production of the records owned by petitioners and held in custody for them in the office at 248 Lorraine Avenue would violate their Fifth Amendment rights under the doctrine of *Boyd* v. *United States*, 116 U.S. 630 (1886).[5] Hearings were held on petitioners' motion to quash before Judge Pollack. Concerning the Fifth Amendment issue Judge Pollack held that this Court's opinion in *Couch* v. *United States, supra*, eliminates any Fifth Amendment claim to documents not in petitioners' personal possession. (Appendix E, pp. 89a-90a, *infra*.)[6] The subpoena as modified was then ordered enforced on April 12, 1973 (Appendix B, pp. 29a-30a, *infra*), but Judge Pollack stayed his order until April 19, 1973 to permit an appeal.

On April 18, 1973 petitioners simultaneously filed their appeal and moved for a further stay pending resolution of the appeal. On that date a panel of the Court of Appeals consisting of Associate Justice Tom C. Clark and Judge Waterman stayed the order pending an expedited hearing on the merits, and on May 1,

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[4] The inventory of the records is attached hereto as Appendix F, pp. 95a-118a, *infra*.

[5] Petitioners also challenged the subpoena on overbreadth grounds and—with respect to some of the documents—the attorney-client privilege.

[6] Regarding petitioners' overbreadth claim, Judge Pollack narrowed the subpoena to exclude four specified categories of documents. He rejected the attorney-client privilege claim.

1973, that stay was extended by the Court until determination of the appeal.[7]

The Court of Appeals then modified Judge Pollack's order to further limit the subpoena to documents relevant to the grand jury's inquiry (Appendix A, pp. 13a-14a, *infra*) but affirmed the order on the Fifth Amendment issue, holding in Section III of the opinion by Chief Judge Friendly that under this Court's decision in *Couch* v. *United States, supra,* privacy is not protected by the Fifth Amendment and petitioners are not otherwise subject to the requisite "personal compulsion" to enable them to assert a Fifth Amendment privilege. (Appendix A, pp. 19a-28a *infra.*)[8]

REASONS FOR GRANTING THE WRIT[9]

This petition brings before the Court a single and important constitutional issue turning on a disputed interpretation of this Court's holding in *Couch* v. *United States, supra,* and having great import for the future of the Fifth Amendment in the United States

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[7] That stay was further extended by the panel on the merits until this Court acts on petitioners' stay application filed simultaneously with this petition. Petitioners agreed below to dispense with any further pre-argument briefing in order to expedite the appeal below. Similarly, petitioners are prepared to accomodate any briefing and argument schedule this Court should deem proper in order to expedite determination of the merits of this petition, should the Court grant it.

[8] The Court also rejected petitioners' attorney-client privilege claim. Appendix A, pp. 14a-19a, *infra.*

[9] Since appellants own the records in question but are not themselves the objects of the grand jury subpoena, they are entitled to appeal the denial of their motion to quash. See *United States* v. *Ryan,* 402 U.S. 530, 533 (1971); *Perlman* v. *United States,* 247 U.S. 7 (1917); *United States* v. *Guterma,* 272 F.2d 344 n.1 (CA2 1959). The Government did not contest appealability below.

today: does the "privacy" portion of this Court's Fifth Amendment jurisprudence survive the Court's ruling in *Couch* v. *United States, supra*? The Second Circuit in an opinion by Chief Judge Friendly, squarely faced that issue and held that privacy as such is *not* protected by the Fifth Amendment, Appendix A, pp. 20a, 23a-26a, *infra* (footnotes omitted);

> .... [Petitioners] emphasize that the Lorraine Avenue office was rented on behalf of Kasser for the express purpose of maintaining the privacy of the records; they suggest that an analogy to the person who keeps his records at home and allows an accountant to have access to them is appropriate here since Kasser, who had sold his home and did not have this option open, did what he viewed as the next best thing. While this case is indeed closer than *Couch*, we think the Government is correct in arguing that *Couch* leads to affirmance
>
> . . . .
>
> Appellants' reliance is on one of the seven considerations listed by Mr. Justice Goldberg in *Murphy:*
>
> " 'Our respect for the inviolability of the human personality and of the right of each individual to a private enclave where he may lead a private life.' *United States* v. *Grunewald*, 233 F.2d 556, 581-82 (Frank, J., dissenting), rev'd 353 U.S. 391.
>
> . . . .
>
> "Despite the eloquence of Judge Frank's phrase, the notion is difficult to accept in the context of the Fifth Amendment. Certainly "the right to a private enclave" lies at the core of the Fourth Amendment's strictures against law enforcement officers. Adopting a rational pattern, this gives the individual almost complete protection against the search and seizure of records of innocent activity and permits the search and seizure of rec-

ords believed to show the commission of crime only when a proper showing has been made. The self-incrimination clause of the Fifth Amendment admittedly affords no protection against compulsory process reaching into "a private enclave" to obtain non-incriminating evidence necessary to the proper determination of a judicial proceeding, see 8 Wigmore, Evidence § 2192, at 72; § 2286, at 528-31, however personal or confidential this may be. It seems a strange concept of a right to privacy that, although this does not protect the most sensitive communications against disclosure in court so long as they are innocent, it demands absolute immunity for incriminating testimony alone. Despite the repetition of Mr. Justice Goldberg's catalogue of reasons for the privilege in *Couch, supra,* 409 U.S. at 328, see also *Miranda* v. *Arizona,* 384 U.S. 436, 460 (1966); *Tehan* v. *United States ex. rel. Shott,* 382 U.S. 406, 414 n.12, 416 (1966), no Supreme Court decision has upheld a Fifth Amendment claim predicated solely, or even primarily, on the basis of an invasion of privacy, although Mr. Justice Douglas urged this in his dissent in *Schmerber* v. *California,* 384 U.S. 757, 778-79 (1966), where the taking of the defendant's blood was surely a far greater offense to privacy than the subpoena of business records. When government has been forbidden to violate a reasonable expectation of privacy, *Katz* v. *United States,* 389 U.S. 347, 361 (1967) (concurring opinion of Harlan, J.), this has been in cases where its acts were held to have violated the Fourth Amendment, not the Fifth. The essence of the self-incrimination clause remains what it has always been—the prohibition of the exercise of compulsion upon the person whose communications, oral or written, may tend to incriminate him, and thus avoiding "the cruel trilemma of self-accusation, perjury or contempt." *Murphy* v. *Waterfront Comm'n. supra,* 378 U.S. at 55.

That holding incorrectly reads this Court's opinion in *Couch;* it also conflicts with all pre-*Couch* decisions of this Court which expressly affirm that privacy is a policy underpinning the Fifth Amendment, and decisions of the Seventh and Ninth Circuits holding that private testimonial records are privileged under the Fifth Amendment and *Boyd* v. *United States, supra,* from Governmental seizure by search warrant. *Hill* v. *Philpott,* 445 F.2d 144 (CA7 1971); *VonderAhe* v. *Howland,* No. 71-1982 (CA9, March 26, 1973). That holding also comes from a record which clearly presents the issue of the continued vitality of the privacy rationale for the Fifth Amendment, for both the Government and petitioners agree on the one critical factual point; *viz,* the Kassers had their personal records moved to the location in question for the express purpose of "hiding" them, see *Couch* v. *United States,* 409 U.S. 337 (Brennan, J. concurring); *i.e.,* for the very purpose of maintaining their privacy in these records.

As Judge Friendly's opinion recognizes, if the Fifth Amendment as such affords petitioners no relief from compelled production of these records, it can only be because privacy as such is *not* an independent policy basis for a Fifth Amendment claim. Since the record is clear on this point and since the file cabinets are now located in the U.S. Attorney's office this Court should now squarely face that issue and decide it.

1. The Court of Appeals in this case mistakenly believed that this Court's recent decision in *Couch* v. *United States,* 409 U.S. 322 (1973), barred any assertion by petitioners of their Fifth Amendment privileges as to their personal records under subpoena. In so holding, the court was forced by the facts of this case —*i.e.,* the relocation of personal records to a separate hiding place for the express purpose of preserving their privacy and confidentiality—to confront squarely and reject the "privacy" rationale for the Fifth Amendment which this Court's *Couch* opinion carefully preserved.

Couch involved a proceeding to enforce an IRS subpoena directed to an accountant, seeking production of certain papers and records relating to the tax liability of the appellant-taxpayer. The taxpayer intervened in the enforcement proceedings, proved her ownership of the records, and asserted a Fifth Amendment privilege. After the Court of Appeals rejected the taxpayer's argument, the Supreme Court granted certiorari to consider whether the taxpayer's "proprietary interest" in the records entitled her to assert the privilege despite the fact that the records were not any longer in her possession. The Court's holding was as follows, 409 U.S. 336 (emphasis added):

> The criterion for Fifth Amendment immunity remains not the ownership of property, but the "physical or moral compulsion exerted." *Perlman,* 247 U.S., at 15. We hold today that no Fourth or Fifth Amendment claim can prevail where, as in this case, *there exists no legitimate expectation of privacy and* no semblance of governmental compulsion against the person of the accused. It is important, in applying constitutional principles, to interpret them in light of the fundamental inter-

ests of personal liberty they were meant to serve
. . . .

Thus, the Court was careful to note that *neither* ownership *nor* possession is in itself controlling; and whether a Fifth Amendment privilege exists in the multifarious fact situations where ownership and possession are separate is to be determined in terms of the twin policies of the Fifth Amendment—protection of a "legitimate expectation of privacy" and prevention of "governmental compulsion against the accused."

That this constitutional policy of protecting a "legitimate expectation of privacy" underlies the Fifth as well as the Fourth Amendment was emphasized by the *Couch* opinion's quotation of *Murphy* v. *Waterfront Commission,* 378 U.S. 52, 55 (1964), identifying as one of the "policies and purposes of the privilege" the "right of each individual 'to a private enclave where he may lead a private life' . . . ." 409 U.S. 328. See also *Katz* v. *United States,* 389 U.S. 347, 350 n.5 (1967); *Tehan* v. *United States ex rel. Shott,* 382 U.S. 406, 416 (1966); *California* v. *Byers,* 402 U.S. 424, 450 (1971) (Harlan, J., concurring); McKay, Self-Incrimination and the New Privacy, 1967 Sup. Ct. Rev. 193, 210.

And even more importantly, the independent role of the "privacy" interest in defining the scope of the Fifth Amendment's protection is demonstrated by the whole of section IV of the *Couch* opinion, 409 U.S. 335-336 wherein the Court—having previously analyzed the *Couch* facts in light of the personal compulsion policy—undertook separately to analyze those facts in light of the privacy policy, holding, 409 U.S. 335-36:

> . . . [P]etitioner here cannot reasonably claim, either for Fourth or Fifth Amendment purposes,

an expectation of protected privacy or confidentiality.

Indeed, this fourth section of the Court's *Couch* opinion demonstrates the fundamental error of the lower Court's analysis of the *Couch* case. For Judge Friendly's opinion takes cognizance of the repetition in *Couch* of the "private enclave" language from *Murphy* v. *Waterfront Commission, supra,* undertaking at length to trace the historical derivation of that phrase through Judge Frank's opinion in *United States* v. *Grunewald, supra.* (See App. A., p. 24a, *infra.*) Yet at the same time Judge Friendly's opinion —on the way to holding that under *Couch* there can be no "Fifth Amendment claim predicted solely, or even primarily, on the basis of an invasion of privacy" (*Id.* 25a)—pointedly ignores the whole of Section IV of the *Couch* opinion as well as the *Couch* Court's express formulation of its own holding in terms of two constitutional policy interests, including privacy. If Judge Friendly is right, Section IV of the *Couch* opinion is pure surplusage, as well as that portion of *Couch's* express description of its holding which deals with privacy.

The untenability of the Second Circuit's reading of *Couch* as requiring rejection of the Fifth Amendment claim on the facts here is also demonstrated by the Court's treatment of the "constructive possession" discussion in *Couch.* In *Couch,* this Court stated, 409 U.S. 333:

> Yet situations may well arise where constructive possession is so clear or the relinquishment of records is so temporary and insignificant as to leave the personal compulsions upon the accused substantially intact.

The taxpayer in *Couch* could show neither "constructive possession" nor "temporary relinquishment" because (1) the records "had been given to the accountant regularly since 1955, and remained in his continuous possession until the summer of 1969 when the summons was issued", 409 U.S. 334; (2) the accountant "worked neither in [Mrs. Couch's] office nor as her employee (*Id.*); and (3) the accountant did "very little work" for the taxpayer, had "many other clients" and was "compensated by the job". (*Id.*, n.18). Thus, the relationship between the accountant and the taxpayer in *Couch* was not of such a character as to equate compulsion against the accountant with compulsion against the taxpayer.

By contrast, in this case, (1) the records when subpoenaed were *not* in Horowitz's possession, but were located in an office rented under Mr. Mallin's name for the express purpose of maintaining the confidentiality of the records placed therein; (2) *none of the records had ever been in Mr. Horowitz's regular or continuous possession; instead* the normal routine prior to the transfer of the records to Lorraine Avenue was for Mr. Horowitz to go to the offices of Technopulp to work on the relevant records when necessary to his functions; and (3) regarding many of the personal records in dispute, they were *not* placed in the Lorraine Avenue office for any reason in any way related to Mr. Horowitz's role as an accountant but rather for purposes of "safe-keeping" *and* in fact, in many instances Mr. Horowitz has *never looked* at them.

Given the fact that a person traveling abroad must conduct his personal business affairs in this country through his agents, a more clear case of "constructive

possession" in the relevant constitutional sense can hardly be imagined. Suppose 248 Lorraine Avenue were appellants' home, and Horowitz were given a key to the home and access to the papers under circumstances identical to those in this case; could the Government under *Couch* avoid the Fifth Amendment by serving Horowitz with a subpoena directing him to go to the home and get the papers? Yet how is this case any different? Appellants sold their home, and the Lorraine Avenue office was leased for the purpose of retaining personal control over the papers. The fact, therefore, that the subpoena purports to compel only Horowitz—not the appellants—to divulge information is of little significance, for Horowitz is being compelled *not* to deliver papers which he routinely possesses and controls, but rather to *remove* those papers from the private and personal enclave created by appellants to protect those papers.

Again Judge Friendly's opinion confronts the facts in this case (See App. A., pp. 26a-28a *infra*) but then simply discounts what the *Couch* opinion says concerning "constructive possession" in circumstances where physical possession is divorced from ownership.

> It is true that Mr. Justice Powell in *Couch* acknowledged that a different result might be reached in cases where the loss of possession by the claimant of the privilege was "fleeting", as instanced by the hypothetical posed in the oral argument in which possession was lost only while being helped across a street, see 409 U.S. at 333 n.15, or where the "constructive possession" of the claimant was 'so clear . . . as to leave the personal compulsions upon the accused substantially intact.' 409 U.S. at 333. A sufficient rea-

son for a different result in the hypothetical, a situation more likely to be encountered in law school classrooms than in real life, is that any other conclusion would trivialize the privilege. As for the "constructive possession" situation, Mr. Justice Powell neither defined the term in a Fifth Amendment context nor decided what the result would be when the definition was met. Given his insistence on the personal nature of the privilege, it seems highly unlikely that he was viewing the term as broadly as courts have done in other contexts, e.g., in applying the inference of knowledge of foreign importation formerly arising from possession of heroin under 21 U.S.C. § 174, see *United States* v. *Hernandez*, 290 F.2d 86, 90 (2 Cir. 1961). That the majority meant what it said in stating that it was merely leaving the question open appears from its refusal, 409 U.S. at 333-34 n.16, either to approve or disapprove a constructive possession claim on the facts of *Schwimmer* v. *United States*, *supra*, 232 F.2d 855, or the decision of this court in *United States* v. *Guterma*, 272 F.2d 344 (2 Cir. 1959), where the facts were much stronger for the claimants than here. Mere recognition that the privilege might be held to apply in some cases where the claimant is not in possession cannot be taken, as appellants urge, to tell us whether and in what circumstances it will. As Mr. Justice Holmes said in *Johnson* v. *United States*, *supra*, 228 U.S. at 458, 'Courts proceed step by step'.

Even if a "constructive possession" sufficient to give rise to the Fifth Amendment privilege would sometimes be recognized, it would be hard to think of a poorer case for recognition than this one. The Kassers have not had actual possession of the records for two years, have never had actual possession of them in their present situs and, from all that appears, do not expect to have it in the near future. It is Horowitz who has both actual pos-

session of the files and complete access to them, facts which, in this context, are inconsistent with the Kassers' claim of constructive possession. It cannot be seriously contended here that the "personal compulsions upon the accused [are left] substantially intact."

Petitioners submit that—contrary to the lower court's suggestion—the Fifth Amendment meaning of the term "constructive possession" and its intended use is quite clear from the *Couch* opinion. Thus, *Couch* itself, right after stating its *holding* to be that no Fourth or Fifth Amendment claim can prevail where, *inter alia*, there exists no "legitimate expectation of privacy" goes on to state that "[i]t is important, in applying constitutional principles, to interpret them in light of the fundamental interests of personal liberty they were meant to serve." 409 U.S. 336. That principle, of course, applies to the Court's use of the "constructive possession" concept in *Couch* itself: petitioners submit that *Couch* intends that the concept of "constructive possession" be applied as a constitutional term of art covering those possession-separated-from-ownership situations where there exists a "legitimate expectation of privacy".[10] In those situations, compulsion on some third party who also happens to have access to the documents to produce the documents in question is equivalent to moral compulsion on the individual owning the documents, so that the requisite "personal compulsion upon the accused" is "substantially intact". 409 U.S. 333.

[10] Thus, the "constructive possession" concept is not to be defined for Fifth Amendment purposes according to the property law concept of "constructive possession". For the property law concept would—like the simplistic test of "ownership"—"draw a meaningless line". 409 U.S. 331.

Once the relevant constitutional definition of "constructive possession" is grasped, then the failure of Judge Friendly's distinction of *Schwimmer* v. *United States*, 232 F.2d 855 (CA8 1956) and *United States* v. *Guterma*, 272 F.2d 344 (CA2 1959) becomes apparent. For here, just in *Guterma* and in *Schwimmer*, the records were placed in the location where they were at the time the governmental compulsion to produce them was put in force expressly for "storage" or "safekeeping" purposes. Indeed, here, unlike *Guterma* and *Schwimmer* it is conceded that the records were located at Lorraine Avenue not merely to keep them safe but to actually hide them. The intention of petitioners to thus preserve the confidentiality of those records is even stronger than was the case in *Schwimmer*, where there was no indication from the facts, as stated in the Court's opinion there, that the lawyer there had any special desire to preserve the confidentiality of the records when he deposited them in "four cardboard boxes and four filing cabinet drawers" and left them with a storage company. 232 F.2d 859.[11]

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[11] The real basis for the lower Court's treatment of the "constructive possession" language in the Court's opinion is suggested by its discussion of *Guterma*. Thus, the Court argues that *Guterma* is distinguishable because in *Guterma* it was observed that since the safe was locked and only the owner and a co-defendant knew the combination "it will still be Guterma who will have to deliver his own papers." 272 F.2d at 346. See App. A, p. 27a n. 20, *infra*. Yet as a Fifth Amendment rationale that is not a sensible basis for quashing the *Guterma* subpoena on the corporation, for it would mean that the Government could get exactly the same records from the same location by the simple device of serving a search warrant on the corporation along with a subpoena and breaking into the safe itself. Such a reading of this Court's Fifth Amendment concept of "constructive possession" has the precise effect of "trivializing the privilege" which Judge Friendly invokes as the explanation for the Court's reservation

In sum, this is a case of "constructive possession" in the Fifth Amendment sense if *Guterma* and *Schwimmer* are such cases. The fact that here, unlike *Schwimmer* and *Guterma,* some of the records were actually examined by the accountant, is no more a basis for finding divestment of the requisite "legitimate expectation of privacy" in the records themselves than it would be in *Couch* if, prior to the service of the subpoena, Mrs. Couch had regained possession of all the records from the accountant. Indeed, suppose Mrs. Couch had the same records in her home and the Government served her with a search warrant supported by probable cause describing those records instead of a subpoena. Would such a direct seizure from her actual physical possession in her own "private enclave" be supportable under *Couch* because those records had once been in the accountant's possession and because the Government could (in the absence of an accountant-client privilege) secure *oral* testimony from the accountant as to the contents of the records by serving him with a subpoena? Or, again, if the *Couch* accountant had been given a key to Mrs. Couch's home to examine the records there—and if he still had the key and Mrs. Couch was out of touch when the Government acted—could he have been given a grand jury subpoena requiring *him* to enter Mrs. Couch's private enclave, take the records, and turn them over to the grand jury?

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of the "temporary relinguishment of possession" category of cases. See App. A. p. 26a, *infra.* See also *Hill* v. *Philpott,* 445 F.2d 144, 149 (CA 7, 1971). It is also incompatible with the fact that if Guterma had a Fifth Amendment privilege to resist identifying the records as his own he could comply with the subpoena by the non-testimonial act of opening the safe and then refuse to give any form of identification of its contents. See *California* v. *Byers,* 402 U.S. 424, 431-32 (1971) (plurality opinion).

Finally, respecting the application of *Couch* to the facts of this case, we note that petitioners' reading of the *Couch* decision also comports with Mr. Justice Brennan's view of that decision, since Mr. Justice Brennan joined the *Couch* opinion on his view that (409 U.S. 309)

> . . . the privilege is available . . . to one who places records in a safety deposit box or in hiding; and to similar cases where reasonable steps have been taken to safeguard the confidentiality of the contents of the records.

That petitioners took "reasonable steps" to safeguard the confidentiality of the papers now under subpoena cannot be doubted. Through two agents—Messrs. Mallin and Horowitz—petitioners undertook to rent a location separate both from their accountant's office and from the Technopulp offices and transferred records from those two locations and from their home to this new private location, *all for the express purpose of ensuring the privacy of the records.* There were only two keys to this office—one being entrusted to Horowitz and the other to petitioners' own son. Short of placing a full-time guard at the door of the office, it is difficult to conceive of any other steps the petitioners might have taken to safeguard the privacy of their papers or, in the language of *Murphy* v. *Waterfront Commission, supra,* to create a "private enclave" from the prying eyes of the Canadians, or anyone whom petitioners did not specifically authorize to view the documents.

2. The lower court's rejection of the privacy rationale of the Fifth Amendment also conflicts with this Court's pre-*Couch* Fifth Amendment jurisprudence recognizing privacy as a Fifth Amendment policy. *E.g., Boyd* v. *United States,* 116 U.S. 616, 630 (1886); *Murphy* v. *Waterfront Commission,* 378 U.S. 52, 55 (1964); *Miranda* v. *Arizona,* 384 U.S. 436, 460 (1966); *Tehan* v. *United States ex rel. Shott,* 382 U.S. 406, 414 n. 12, 416 (1966). In effect, the court here has read *Couch* as overruling *Boyd* v. *United States, supra* (or at the very least limiting *Boyd* to its exact facts), a course of action Judge Friendly previously recommended. See Friendly, The Fifth Amendment Tomorrow: The Case for Constitutional Change, 37 U. Cin. L. Rev. 671 (1968). The answer to that view was given by Mr. Justice Harlan in concurring in the result in *California* v. *Byers,* 402 U.S. 424, 450-51 and 451 n.5:

> Though the "privacy" rubric is not without its difficulties in the Fifth Amendment area [here citing Judge Friendly's article] it does, I think, capture an important element of the concerns of the privilege, which accounts in part for our willingness to accept its reach beyond the context of the criminal investigation or trial. The premise of the criminal sanction—and the disgrace that goes with it—is that it is more feared than the mere censure of our fellow members of society; although communal living requires us to be willing to disclose much to the government and our fellow citizens about our private affairs—and although the fear of eventually having to disclose much operates as an inhibiting factor on our personal lives—it still makes sense to think of the

> Fifth Amendment as intended at least in part to relieve us of the very particular fear arising from the imposition of criminal sanctions.

Indeed, it does make sense to thus view the Fifth Amendment, for what happens to our inner sense of personal security if the Government can—by evasive devices of either finding a third party with legal access to our personal records or simply using a search warrant instead of a subpoena—get hold of our own testimonial declarations *made and carefully preserved in private* and employ them against us in a criminal prosecution for whatever incriminating value they may seem to have in light of future accusations and occurrences? Nor is it sensible in contemporary society to contend that if you *show* the records to your accountant, you are manifesting your lack of expectation of privacy in those records. Whatever the reasonableness of that view where you *give* the records to the accountant permanently—in effect making them a part of *his office files and his business records* in all but the technical property sense of title to them, *cf., Couch* v. *United States, supra*—to extend that analysis to situations involving mere authorization to examine the records visually is truly to burden the privilege in an unconstitutional manner, in light of the realities of criminal and civil tax penalties. See *Couch*, 409 U.S. 342 (Douglas, J. dissenting). Also, that analysis—if extended to this case—means simply that all business records are public records not subject in any fashion to Fifth Amendment claims, given the comprehensive state and federal regulatory schemes for business activities and the consequential need to show one's personal records to trusted professional experts in accounting and tax if one is to stay clear of criminal prosecution. Similar concepts of "waiver" or divest-

ment of "legitimate expectations of privacy" in personal business records by virtue of acting to maintain them in compliance with law have been rejected by this Court. Compare *Marchetti* v. *United States*, 390 U.S. 39, 55-58 (1968) with *Shapiro* v. *United States*, 335 U.S. 1 (1948).

Further, the elimination of privacy as a Fifth Amendment policy per the lower court's holding in this case inevitably necessitates the elimination of the Fifth Amendment in virtually every circumstance other than the historical "criminal-defendant-in-the-dock" situation. *First*, why—*sans* privacy—should physical possession of documents suffice to justify assertion of a Fifth Amendment privilege? This Court has repeatedly held that the Fifth Amendment protects only governmentally coereed testimonial declarations. *E.g.*, *Schmerber* v. *California*, 384 U.S. 757 (1968). And evidentiary actions such as standing or walking in a lineup, or supplying handwriting or fingerprints are non-testimonial for Fifth Amendment purposes. See *United States* v. *Wade*, 388 U.S. 218, 221-23 (1967); *United States* v. *Dionisio*, — U.S. —, 41 U.S.L.W. 4180 (1973). So too, apparently, is the very evidentiary act of selecting oneself out of the public at large and identifying oneself as connected with a particular automobile accident under governmental investigation. See *California* v. *Byers*, 402 U.S. 424, 431 (1971) (plurality opinion). If that be so, then why should the act of identifying one's documents be sufficiently "testimonial" to justify assertion of the Fifth Amendment?[12] And even if this problem is avoided, what

[12] It cannot be because the documents themselves contain testimonial declarations, for the analytical premise of the no-privacy view is that no Fifth Amendment interest inheres in the documents themselves.

is to prevent the grant of use immunity limited to the testimonial declarations entailed in identifying the documents pursuant to the *testificandum* portion of a subpoena *duces tecum?* The short of the matter is that after this Court's holding in *Kastigar* v. *United States*, 406 U.S. 441 (1972), the elimination of the privacy portion of *Boyd* v. *United States supra*, means that all of our private papers are effectively subject to compelled governmental production and use against us in criminal proceedings.

Nor does the emasculation of established Fifth Amendment concepts stop at the point of our personal writings. For if privacy has no role to pay in defining the scope of the Fifth Amendment, then the privilege would seem not to be available to witnesses in civil suits, see *McCarthy* v. *Arndstein*, 266 U.S. 34 (1924), a context where "in most instances, information is sought by a private party wholly for purposes of resolving a private dispute." *California* v. *Byers*, 402 U.S. 424, 450 (Harlan, J. concurring).[13] If, as the lower court here said, petitioners "bear scant resemblance to John Lilburne in the dock" (App. A, p. 23a, *infra*) the same point may be made of the aver-

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[13] One can, of course, argue from *Shelly* v. *Kraemer*, 334 U.S. 1 (1948) that the use of Court processes to enforce the subpoena constitutes the requisite "state action" to bring to bear "governmental" as opposed to private compulsion. But that argument—besides "trivializing the privilege" just as the testimonial identification justification trivializes it—ignores the fact that the judge in a civil suit is really neutral in the trial process, and it is the opposing private party that—by his questioning—puts the witness in the "cruel trilemma of self-accusation, perjury or contempt" which the lower court held was the *sine qua non* of the Fifth Amendment's personal compulsion policy. App. A, p. 26a, *infra*.

age litigant sitting in a civil deposition in the average negligence suit.

These concerns, we believe, demonstrate the basic wisdom of the Court's consistent recognition from *Boyd* through *Couch* that the modern privilege in contemporary society serves fundamental personal privacy interests, whatever the historic origins of the privilege in common law England. The continued vitality of that fundamental principle of the Court's Fifth Amendment jurisprudence is now squarely challenged by the Second Circuit's holding in this case on a record that clearly poses the issue in the very terms framed by the Court in *Couch*.

3. These considerations also demonstrate that the court's holding that privacy is not a basis for an assertion of the Fifth Amendment necessarily entails a conflict with the holdings of the Seventh Circuit in *Hill* v. *Philpott*, 445 F.2d 144 (1971) and the Ninth Circuit in *VonderAhe* v. *Howland*, No. 71-1982 (decided March 26, 1973). In those cases, the I.R.S. seized via search warrants supported by probable cause business records of the taxpayers from the taxpayers' homes and offices. Both circuits, relying on *Boyd* v. *United States, supra*, held the seizure of these records violative of the Fifth Amendment.

The Second Circuit's opinion here purports to distinguish these cases as turning on the issue "how far a possessor of incriminating documents who would be protected by the Fifth Amendment from their compelled production is protected by the Fourth Amendment from an otherwise lawful search and seizure"

(App. A, p. 21a, n.12, *infra*). But that purported distinction fails for at least two reasons.

First, both the *Hill* and *VonderAhe* courts rested their holdings on the Fifth Amendment right not to be subject to compelled production of one's private testimonial written declarations for subsequent use in criminal proceedings. Indeed, in *Hill* the court expressly stated that "we consider only the first contention, which is based on the petitioner's privilege against self-incrimination" (445 F.2d 146), and declined to utilize Judge Friendly's Fourth Amendment approach (*see United States* v. *Bennett*, 409 F.2d 888 (CA2 1969)) as suggested by Judge Fairchild in dissent (445 F.2d 150; *compare* App. A, p. 21a, n.12, *infra*).

Second, given this Court's holding in *Warden* v. *Hayden*, 387 U.S. 294 (1967), once privacy is eliminated as a Fifth Amendment concern there is simply no basis under the Fourth Amendment for forbidding probable cause searches and seizures of one's personal writings. Thus, for example, suppose use immunity were granted under the Fifth Amendment applying to the contents of the papers sought by search warrant *or* subpoena, would there still be a potential Fourth Amendment privacy claim assuming probable cause? Very simply, the analytical premise of *VonderAhe* and *Hill's* recognition of a privacy right *in the papers* themselves has to be that there is a Fifth Amendment interest inhering in testimonial writings maintained in confidence regardless of physical possession. See *Hill* v. *Philpott*, *supra*, 445 F.2d 144, 148.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 943—September Term, 1972.

(Argued May 1, 1973 Decided June 8, 1973.)

Docket No. 73-1570

IN RE
GRAND JURY SUBPOENA SERVED UPON
SIMON HOROWITZ

Before:

FRIENDLY and HAYS, *Circuit Judges*,
and JAMESON,* *District Judge*.

Appeal from an order of the District Court for the Southern District of New York, Milton Pollack, *Judge*, refusing to quash (save in certain respects specified in the order) a *subpoena duces tecum* requiring Simon Horowitz, an accountant, to produce before a grand jury the contents of three file cabinets of an absent client, to which the accountant had access. Modified and affirmed.

MARTIN D. MINSKER, Esq., Washington, D.C., (Herbert J. Miller, Jr., Esq., Miller, Cassidy, Larrocca & Lewin, Washington, D.C., and Michael A. Lacher, Esq., New York, N.Y., of counsel), *for Appellants, Alexander and Elizabeth Kasser*.

JOHN W. NIELDS, JR., Esq., Assistant United States Attorney (Whitney North Seymour, Jr., Esq., United States Attorney for the Southern District of New York, of Counsel), *for Appellee*.

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*Of the District Court for Montana, sitting by designation.

FRIENDLY, *Circuit Judge:*

Attorneys for Alexander and Elizabeth Kasser[1] appeal from an order of the District Court for the Southern District of New York which refused, save in certain respects hereafter indicated, to quash a *subpoena duces tecum* requiring the Kassers' accountant, Simon Horowitz, to produce before a federal grand jury "the contents of all three file cabinets at 248 Lorraine Avenue, Upper Montclair, N.J., Office No. 4."

Although the record is exceedingly meagre, the factual background seems to be substantially as follows:

The case springs from a plan of the Manitoba Development Fund (MDF) to encourage the building of a huge complex, including sawmills, pulp mills and paper mills, at an area in northern Manitoba known as The Pas, in order to make commercial use of its undeveloped forests. Early in 1966, MDF entered into an agreement with Alexander Kasser and others, acting under the name of Churchill Forest Industries, Ltd. (CFI), representing an assortment of Canadian and foreign enterprises, to construct this complex with MDF financing. When construction fell behind and a $1,500,000 interest payment was defaulted, a Canadian court, on the request of the Manitoban Government, appointed a receiver to complete the project, and the Royal Canadian Mounted Police began an investigation to determine whether any of the funds loaned by MDF had been misapplied. Allegedly the investigation developed evidence that sums up to $20,000,000 had been diverted into the hands of various corporations, including Canequip Exports Ltd., a Canadian corporation, and of Kasser and other individuals. After seizure of Canequip's records in Montreal pur-

[1] We put the matter thus because the Kassers are in some place, presumably in Europe, unknown to their attorneys. However, the attorneys apparently have means for communicating with the Kassers and the Government has not disputed their authority to act on the Kassers' behalf.

suant to a search warrant on July 14, 1971, some $220,000 was allegedly drawn from Canequip's bank account with the Royal Bank of Canada in Montreal, deposited to Canequip's account in a bank in New York City and later wired to an account in Switzerland. A grand jury in the Southern District of New York is investigating whether this transaction and others violated United States criminal laws, particularly 18 U.S.C. § 2314, which prohibits the interstate or foreign transportation of funds obtained through fraud.

Among the many Kasser corporations involved in The Pas project was one known as Technopulp, Inc., having its offices in northern New Jersey. Shortly after the seizure of Canequip's records in Montreal, Kasser, who was about to sell his house in New Jersey and leave for parts unknown, communicated with his New York City accountant, Simon Horowitz, and directed that, in order to avoid a seizure of corporate and personal records at the offices of Technopulp, these should be removed. These records, contained in three locked filing cabinets, were first deposited in the New Jersey home of Kasser's son, Michael, and then moved into a room at an office building at 248 Lorraine Avenue, Upper Montclair, N.J. Some files that were temporarily in Horowitz' office for use by him in connection with tax audits, as well as some records that Kasser had kept at his home, were also placed there. The lease ran to Joel Mallin, Kasser's New York lawyer, who has paid the rent but has been reimbursed by checks signed by Horowitz on one of Kasser's bank accounts. Mallin has never been in the Lorraine Avenue office. One of the two keys to the office is in the possession of Michael Kasser, who has never used it; the other is in the possession of Horowitz, who has. There are also two keys to the filing cabinets; Horowitz has one and the other has been left in the office. From time to time Horowitz has gone to the office, unlocked the filing cabinets, and made extensive use of the records in his work as accountant for the Kassers and the corporations.

Before learning of the existence of the Lorraine Avenue office, the Assistant United States Attorney in charge of the grand jury investigation of Kasser served on Horowitz, on July 26, 1972, a *subpoena duces tecum* requiring him to produce before the grand jury seven categories of records. After learning from Horowitz' testimony before the grand jury about the office and Kasser's scheme for concealing records there a second *subpoena duces tecum* was served two days later, which was evidently intended to supplant the first. This required Horowitz to produce the entire contents of all three file cabinets in the Lorraine Avenue office. Pursuant to agreement between Horowitz and the Assistant United States Attorney, the three file cabinets were brought to the latter's office, where they were to remain unopened pending the outcome of the contemplated motion to quash. After completing an inventory of their contents, Horowitz moved to quash the subpoena in October, 1972. For reasons not stated, no action was taken with respect to this motion for nearly six months. Meanwhile, in March, 1973, Kasser and his wife, through their attorneys, also moved to quash, on the three bases of overbreadth of the subpoena, violation of the attorney-client privilege with respect to letters between Kasser and his lawyers, and, if the motion is read charitably, violation of the Kassers' privilege against self-incrimination.

The motions to quash were brought on for hearing on March 28, 1973. Testimony was taken on that day and again on April 9. At the end of the latter hearing Judge Pollack delivered an oral opinion declining to quash the subpoena except with respect to four items specified in his order of April 12, 1973.[2] He stayed execution of the subpoena until

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[2] These are:

a. The personal wills of Alexander and Elizabeth Kasser;

b. Trust agreements of Alexander and Elizabeth Kasser;

c. Patents owned by Alexander and Elizabeth Kasser; and

April 19; a panel of this court extended the stay pending an expedited hearing on May 1, and we extended it until determination of the appeal.

1. *Overbreadth*

The notion that a *subpoena duces tecum* may constitute a search forbidden by the Fourth Amendment owes its birth to the famous case of *Boyd* v. *United States*, 116 U.S. 616, 621-22, 630 (1886), where Mr. Justice Bradley reached this result enroute to holding that court-ordered production of a person's "private papers" violated the Fourth as well as the Fifth Amendment.[3] The Fourth Amendment portion of the Boyd decision was surely not based on the overbreadth of the Government's demand: the Government sought only a single invoice of unquestionable revelance.[4]

Twenty years later the Supreme Court had occasion to reconsider this portion of the *Boyd* holding in the almost equally famous case of *Hale* v. *Henkel*, 201 U.S. 43 (1906). See also *ICC* v. *Baird*, 194 U.S. 25, 44-47 (1904). By the time *Hale* v. *Henkel* was decided, the composition of the

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d. Letters of Alexander or Elizabeth Kasser which are strictly personal.

The order also provided that if a dispute should arise as to whether any documents fell within these exceptions, they should immediately be submitted to the Court for *in camera* inspection and that documents turned over pursuant to the order should not be disclosed to Canadian criminal authorities except pursuant to motion on notice.

[3] Mr. Justice Miller and Chief Justice Waite dissented from this portion of Mr. Justice Bradley's opinion, 116 U.S. at 638-41.

[4] The notice to produce involved in *Boyd* was indeed unusual in that the statute under which it was issued declared that if the defendant failed to produce the record, the allegations which the motion of the United States Attorney stated he expected to prove from it "shall be taken as confessed." 116 U.S. at 620. But this goes to justifying the holding under the Fifth Amendment rather than that under the Fourth.

Court had almost entirely changed; of the *Boyd* court only Mr. Justice Harlan remained. Mr. Justice Brown wrote the majority opinion, representing the views of five Justices. They thought "it quite clear that the search and seizure clause of the Fourth Amendment was not intended to interfere with the power of courts to compel, through a *subpoena duces tecum*, the production, upon a trial in court, of documentary evidence." 201 U.S. at 73. On the other hand, such a subpoena might constitute a forbidden search if its terms were "unreasonable," and the majority, regarding the *subpoena duces tecum* at issue requiring the production of books and records, of the MacAndrews & Forbes Company, which was being investigated under the Sherman Act, held that it was "far to sweeping in its terms," 201 U.S. at 77. The majority asserted, in what seems to have been a bit of hyperbole, that "If the writ had required the production of all the books, papers and documents found in the office of the MacAndrews & Forbes Company, it would scarcely be more universal in its operation or more completely put a stop to the business of that company" and that it was "difficult to say how [the corporation's] business could be carried on after it had been denuded of this mass of material . . . ." 201 U.S. at 77. While ultimately production of many of the documents might be properly required, "some necessity should be shown, either from an examination of the witnesses orally, or from the known transactions of these companies with the other companies implicated, or some evidence of their materiality produced, to justify an order for the production of such a mass of papers." *Id.* On the other hand, since Hale, an officer of MacAndrews & Forbes, was not justified in refusing to answer oral questions propounded to him, the order remanding him for contempt was affirmed.

Three other opinions were written. Mr. Justice Harlan concurring, although agreeing, in more moderate terms, "that the subpoena duces tecum was too broad and indefinite," 201 U.S. at 78, thought that Hale had no standing to

assert the company's rights and also that a corporation was not protected by the Fourth Amendment. Mr. Justice McKenna, also concurring, echoing the point made by Mr. Justice Miller in his dissent in *Boyd*, see note 3 *supra*, agreed that a properly limited subpoena was not within the Fourth Amendment but could not believe that a subpoena could "lose this essential distinction from a search warrant by the generality or specialty of its terms." 201 U.S. at 80. Mr. Justice Brewer, joined by Chief Justice Fuller, dissented; they challenged Mr. Justice Harlan's view concerning the inapplicability of the Fourth Amendment to corporations, referred to Mr. Justice Bradley's opinion on *Boyd*, and disagreed with the holding that, despite the invalidity of the subpoena, Hale was properly remanded. 201 U.S. at 88-89.

Hale v. *Henkel* left the applicability of the Fourth Amendment to *subpoenas duces tecum* in a most confusing state. None of the Justices seemed to think that such a subpoena could be issued only "upon probable cause, supported by oath or affirmation," as would be required for a search warrant. Nevertheless, except for Mr. Justice McKenna, all were of the view that an overbroad *subpoena duces tecum* against an individual would be an unreasonable search and seizure.

For the next twenty years Supreme Court decisions in this area were mainly concerned with what constituted overbreadth. In a number of cases the Court enforced *subpoenas duces tecum* which, while somewhat less broad than that in *Hale* v. *Henkel*, could scarcely be regarded as narrow. *Consolidated Rendering Co.* v. *Vermont*, 207 U.S. 541, 553-54 (1908); *Wilson* v. *United States*, 221 U.S. 361, 375-76 (1911); *Wheeler* v. *United States*, 226 U.S. 478, 489 (1913); and, perhaps most notable, *Brown* v. *United States*, 276 U.S. 134, 142-43 (1928). The movement toward undermining the practical importance of *Hale* v. *Henkel* was later furthered in a series of cases relating to administrative subpoenas.

The most important is *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1946). That case involved *subpoenas duces tecum* issued by the Wage and Hour Administrator in an investigation of possible violations of the Fair Labor Standards Act, which called for production of all books, papers and documents showing hours worked and wages paid to employees over a five year period, and other documents, apparently necessary to establish the company's coverage under the Act, relating to distribution of newspapers, dissemination of news, sources of news, and sources of advertising outside the state of Oklahoma. Picking up the point made by Mr. Justice Miller in *Boyd* and by Mr. Justice McKenna in *Hale* v. *Henkel*, Justice Rutledge raised doubts whether the Fourth Amendment was properly applicable to judicial enforcement of subpoenas at all. Thus, he stated, 327 U.S. at 195:

> The short answer to the Fourth Amendment objections is that the records in these cases present no question of actual search and seizure, but raise only the question whether orders of court for the production of specified records have been validly made . . . . No officer or other person has sought to enter petitioners' premises against their will, to search them, or to seize or examine their books, records or papers without their assent, otherwise than pursuant to orders of court authorized by law and made after adequate opportunity to present objections . . .

Mr. Justice Rutledge further explained, 327 U.S. at 202:

> The primary source of misconception concerning the Fourth Amendment's function lies perhaps in the identification of cases involving so-called "figurative" or "constructive" search with cases of actual search and seizure. Only in this analogical sense can any question related to search and seizure be thought to arise in situations which, like the present ones, involve only the validity of authorized judicial orders.

And this was followed by a statement, 327 U.S. at 208, that "the Fourth [Amendment], *if applicable*, at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be 'particularly described'." (Emphasis supplied)

On the other hand, *Oklahoma Press* made clear that there still were constitutional restrictions on the scope of *subpoenas duces tecum*, whether these derived from the Fourth Amendment or the due process clause. For administrative subpoenas these were stated to be, 327 U.S. at 208-09:

> 1) "The gist of the protection is in the requirement . . . that the disclosure sought shall not be unreasonable."
>
> 2) "The requirement of 'probable cause, supported by oath or affirmation,' literally applicable in the case of a warrant, is satisfied in that of an order for production by the court's determination that the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry."
>
> 3) "[T]he requirement of reasonableness, including particularity in 'describing the place to be searched, and the persons or things to be seized,' also literally applicable to warrants, comes down to specification of the documents to be produced adequate, but not excessive, for the purposes of the relevant inquiry. Necessarily . . . this cannot be reduced to formula; for relevancy and adequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry."

Any thought that *Oklahoma Press* was limited to subpoenas issued by administrative agencies, as distinguished from grand jury subpoenas, was dispelled by *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950), which, al-

though involving administrative action and distinguishing subpoenas issued in the course of a trial, 338 U.S. at 641-42, justified the agency's demand by an analogy to the grand jury "which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." Although the *Morton Salt* opinion approved a demand for reports only when "the demand is not too indefinite and the information sought is reasonably relevant," 338 U.S. at 652, the lack of any meaningful content in the latter requirement was made evident in *CAB* v. *Hermann*, 353 U.S. 322 (1957), a per curiam opinion reversing 237 F.2d 359 (9 Cir. 1956). The *subpoenas duces tecum*, there issued by the Civil Aeronautics Board in an investigation of alleged violations of the Civil Aeronautics Act by a group of individuals and business entities operating as the Skycoach air travel system, were characterized by the Court of Appeals as calling for "practically all records, books and documents of or concerning the companies," 237 F.2d at 361;[5] the Court of Appeals had held that the relevance of each item must be established before its production could be ordered. The Supreme Court read the order of the district court as enforcing "the Board's right to call for documents relevant to the issues of the Board's complaint," 353 U.S. at 323, without indicating how the district court could have determined relevancy without knowing more about the documents than the record disclosed, see 237 F.2d at 362. *McPhaul* v. *United States*,

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[5] Examination of the subpoenas indicates that this characterization, while perhaps slightly exaggerated, comes closer to conveying the true picture than the Court's rather bland reference to "certain categories of documents of the respondent companies covering specified periods of time." 353 U.S. at 323. It is plain that compliance with the subpoenas was exceedingly burdensome, though the district court limited this somewhat by permitting compliance over a two-week period, and the relevance of many of the items was not discernible from the subpoenas themselves.

364 U.S. 372, 382-83 (1960), also recognized the impracticability in many cases of detailed advance determination of relevancy. In sustaining a *subpoena duces tecum* issued by the House Committee on Un-American Activities calling for production of "all records, correspondence and memoranda pertaining to the organization of, the affiliation with other organizations and all monies received or expended by the Civil Rights Congress" for purposes of an investigation into the organization's alleged connections with Communist activity, the Court said, 364 U.S. at 182:

> It is not reasonable to suppose that the Subcommittee knew precisely what books and records were kept by the Civil Rights Congress, and therefore the subpoena could only "specif[y] . . . with reasonable particularity, the subjects to which the documents . . . relate." . . . The call of the subpoena for "all records, correspondence and memoranda" of the Civil Rights Congress relating to the three specified subjects describes them "with all of the particularity the nature of the inquiry and the [Subcommittee's] situation would permit," *Oklahoma Press Pub. Co.* v. *Walling*, supra, (327 U.S. at 210, note 48).

The traditional Fourth Amendment formulation was repeated in *See* v. *City of Seattle*, 387 U.S. 541, 544 (1967), where Mr. Justice White said in dictum:

> It is now well settled that, when an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.

The latest chapter in this history is furnished by the companion cases of *United States* v. *Dionisio*, —— U.S. ——, 41 U.S.L.W. 4180 (1973), and *United States* v. *Mara*,

—— U.S. ——, 41 U.S.L.W. 4185 (1973). In the *Dionisio* case, relating to grand jury subpoenas to furnish voice exemplars, the Court held, —— U.S. at ——, 41 U.S.L.W. at 4182:

> It is clear that a subpoena to appear before a grand jury is not a "seizure" in the Fourth Amendment sense, even though that summons may be inconvenient or burdensome.

In *Mara*, which dealt with a grand jury subpoena requiring the production of handwriting and printing exemplars, the Court reached the same result with respect to what amounted in practical effect to a *subpoena duces tecum*. These decisions, and the reasoning behind them, suggest that the Court may be moving toward the position, urged by Mr. Justice Miller in *Boyd* and Mr. Justice McKenna in *Hale* v. *Henkel* and strongly intimated in *Oklahoma Press Publishing Co.* v. *Walling*, that restriction on overbroad *subpoenas duces tecum* rests not on the Fourth Amendment but on the less rigid requirements of the due process clause.

However great the intellectual interest of this question, we are not required to decide it. Whatever the dubieties in the Court's opinions in this area over the past decades, some things are tolerably clear: The production of the single invoice required in the *Boyd* case would not now be invalidated on Fourth Amendment grounds. Indeed, that result was inherent in *ICC* v. *Baird, supra*, 194 U.S. 25, and in *Hale* v. *Henkel* itself, 201 U.S. at 72-73. And, although the Constitution undoubtedly protects against overly broad *subpoenas duces tecum*, the subpoena issued in *Hale* v. *Henkel* would not likely be deemed too broad today in light of *Oklahoma Press*, *Morton Salt*, and *CAB* v. *Hermann*. See K.C. Davis, Administrative Law Treatise § 3.04, at 174-79 (1958).

With this background we proceed to review the *subpoena duces tecum* here at issue, in light of the Supreme

Court's instructions, notably in *Oklahoma Press Publishing Co.* v. *Walling, supra,* 327 U.S. at 208-09, and such decisions of the courts of appeals as *McMann* v. *SEC,* 87 F.2d 377 (2 Cir.) (L. Hand, *J.*) *cert. denied,* 301 U.S. 684 (1937), and *Schwimmer* v. *United States,* 232 F.2d 855 (8 Cir.), *cert. denied,* 352 U.S. 833 (1956). Clearly the subpoena was not open to objection on the score of vagueness; Horowitz was told exactly what he must produce. Neither would compliance with the subpoena be unduly burdensome on or "put a stop to the business" of the Kassers, a consideration which, as indicated, was stressed in *Hale* v. *Henkel, supra,* 201 U.S. at 76-77; the subpoenaed records were not being used for any business purpose.

What is more troubling is the matter of relevance. The subpoena requires production of all documents contained in the files, without any attempt to define classes of potentially relevant documents or any limitations as to subject matter or time period. The failure to limit the subpoena by subject matter is not necessarily fatal. The grand jury is entitled to consider not only whether the Kassers violated federal criminal law by making the $220,000 transfer from Canequip's Montreal bank account to its New York account to an account in Switzerland in 1971 but whether they used the United States mails or facilities of interstate or foreign transportation or communication in other ways to consummate the alleged frauds. Moreover, any document relating to Kasser's finances, or any that sheds light on the complex corporate structure of Kasser's enterprises, which he allegedly used to conceal the misapplication of funds in The Pas project, may turn out to be relevant to the grand jury's inquiry, and this prospect is somewhat heightened by Kasser's zeal in attempting to put the documents where they would not be found. However, we are told that some of the subpoenaed documents date back to 1951, and it is difficult to see what relevance there could be in papers so long antedating the inception

of The Pas project in 1966. Accordingly, we shall limit the subpoena so that in the case of any paper dated prior to January 1, 1966, the government must make a minimal showing that, in light of other evidence that has been obtained, the paper may be relevant to the grand jury's investigation of a federal crime. With respect to papers dated on or after January 1, 1966, we will place the burden the other way. If the Kassers can satisfy Judge Pollack that a particular category of documents can have no conceivable relevance to any legitimate object of investigation by the federal grand jury, see Hall, Kamisar, LeFave and Israel, Modern Criminal Procedure 808 (3d ed. 1969), that category need not be produced. If the judge should find that overseeing compliance is too burdensome, he is free to utilize a magistrate or appoint a special master. All the papers shall remain impounded for such reasonable time as may be needed for completion of the grand jury's inquiry.

II. *Attorney-Client Privilege*

Of the inventory of many hundreds of folders in the file cabinets, fifteen folders contain legends indicating that they may contain communications from or to lawyers.[6]

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[6] The first folder is labeled:
Siace Celanese Participations—Roberts & Holland—Attorneys letters.

Roberts & Holland is a well-known firm of tax attorneys. The others are labeled as follows:

2. Kasser—Roberts & Holland
3. Kasser—Joel Mallin file
4. Siace—Foreign Corps. containing letters from Roberts & Holland—Kasser tax information return forms—Celanese tax information return forms, and Celanese Correspondence and Siace data
5. Kasser—Radio Hill letter from Roberts & Holland and papers re: Siace—Radio Hill
6. Blue Construction agreement with Technopulp Machinery Letter from Roth Carlson, attorneys

As indicated in the footnote, we cannot now tell just which were communications with the Kassers, although numbers 2, 3, 5, 7, 8, 9, and 11 appear to be, as might number 10 if only we knew who or what "Trezona" was. We likewise do not know how far the contents of these files may be excluded by the rulings in Part I of this opinion. The Government contended, and the district court held, that whatever attorney-client privilege may have existed while such materials were in the Kasser's possession, this was lost when they caused the communications to be transferred to the Lorraine Avenue office in such a manner that Horowitz had unrestricted access to them.

The record concerning Horowitz' use of the files containing communications between the Kassers and lawyers is meagre. Horowitz first testified that "If the file was labeled 'Legal', I had no occasion to look at it," although there may have been times when Kasser showed him a letter from a lawyer. Later, he conceded that he "may have thumbed through them" or "glanced at them", and may have "seen what they said." He claimed, however, that he would read the legal files "[o]nly if there was some specific reason for me to search for something or Kasser had told me that there was a legal opinion on it,

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Letter to Chemical Bank
Unrelated photostats

7. Kasser Radio Hill—Celanese—Letters from attorneys and legal documents re: Sale & Redemption of shares
8. Kasser letters from attorneys and other tax information 1099 forms relating to Kasser—Radio Hill
9. Kasser—Commerce Dept. forms filed—correspondence with Commerce Dept. and letters from attorneys
10. Legal correspondence from Trezona to Kasser
11. Legal correspondence to Kasser
12. RS legal correspondence
13. Legal correspondence re: River Sawmills
14. Legal opinion re: timber contracts
15. Legal correspondence to Mochary from Thompson Dilts & Co.

and that was "rare," since usually he would communicate directly with the attorneys when a legal problem arose.

We held in *United States* v. *Kovel*, 296 F.2d 918 (2 Cir. 1961), that, despite the contrary indication in clause (7) of Wigmore's formulation of the attorney-client privilege,[7] it was not fatal to the privilege that disclosure of confidential communications was sought from an accountant rather than from the client or his legal adviser.[8] It follows that the attorney-client privilege is not inapplicable here solely because the documents were in Horowitz' possession.

However, the problem in *Kovel* was different from that here presented. We held there that the privilege extended to communications to an accountant for subsequent use in obtaining advice from a lawyer. Here the advice had already been obtained from the lawyers and the communications were then made available by the client to the accountant for purposes unrelated to the seeking of legal advice. In that light such communications as Horowitz actually reviewed come under the contrary holding in *Himmelfarb* v. *United States*, 175 F.2d 924, 939 (9 Cir.), *cert. denied*, 338 U.S. 860 (1949); see *United States* v. *Kovel*, *supra*, 296 F.2d at 992 n.3. We deem it clear that subse-

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[7] See 8 Wigmore, Evidence § 2292 (McNaughton rev. 1961), at 554:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

[8] The Proposed Federal Rules of Evidence likewise omit the limitation of Wigmore's clause (7). Rule 503(b) provides that a client has a privilege to prevent "any other person" from disclosing confidential communications, so long as these were "made for the purpose of facilitating the rendition of professional legal services."

quent disclosure to a third party by the party of a communication with his attorney eliminates whatever privilege the communication may have originally possessed, whether because disclosure is viewed as an indication that confidentiality is no longer intended or as a waiver of the privilege. See McCormick, Evidence § 93, at 197 (Cleary ed. 1972), and cases there cited; 8 Wigmore, Evidence § 2311, at 599 (McNaughton rev. 1961); Simon, The Attorney-Client Privilege as Applied to Corporations, 65 Yale L.J. 953, 981 (1956); *Edison Elec. Light Co.* v. *United States Elec. Lighting Co.*, 44 F. 294, 298 (C.C.S.D.N.Y. 1980).

This leaves for decision the applicability of the attorney-client privilege to files possibly containing communications that were initially within that privilege, to which Horowitz had unrestricted access at the Lorraine Avenue office but which he apparently never viewed. While there has been much discussion how far the privilege is destroyed by the presence of third persons at an oral communication, see 8 Wigmore, *supra*, § 2311; McCormick, *supra*, § 91, at 188-89, and as to disclosure by persons hearing the conversation,[9] there seems to be relatively little authority on the issue whether confidentiality is lost by placing written communications between lawyer and client in a place where they are available to others.

Certain basic principles, however, are well-established. The privilege finds its justification in the need to allow a client to place in his lawyer the "unrestricted and unbounded confidence", *United States* v. *Kovel*, *supra*, 296 F.2d at 921, that is viewed as essential to the protection

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[9] Citing substantial authority, Wigmore thought disclosure by such a person to be permissible even when the person was an eavesdropper, § 2326. This rule was adopted in the ALI's Model Code of Evidence (1942); see Rule 210 & comment b. The Uniform Rules of Evidence, Rule 26, and now the Proposed Federal Rules of Evidence, see Rule 503(b) & Advisory Committee's Note, take a contrary view with respect to the eavesdropper.

of his legal rights. But the privilege stands in derogation of the public's "right to every man's evidence", 8 Wigmore, *supra*, § 2192, at 70, and as "an obstacle to the investigation of the truth," *id.*, § 2291, at 554; thus, as Wigmore has said, "It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle." *Id.* It must be emphasized that it is vital to a claim of privilege that the communications between client and attorney were made in confidence and have been maintained in confidence. And, as with all privileges, the person claiming the attorney-client privilege has the burden of establishing all essential elements, *United States* v. *Kovel*, *supra*, 296 F.2d at 923.

In light of these principles, we think that Kasser has failed to discharge his burden. The comments of one district court, *United States* v. *Kelsey-Hayes Wheel Co.*, 15 F.R.D. 461, 465 (E.D. Mich. 1954), are pertinent here:

> It is difficult to be persuaded that the documents were intended to remain confidential in the light of the fact that they were indiscriminately mingled with the other routine documents of the corporation and that no special effort to preserve them in segregated files with special protections was made. One measure of their continuing confidentiality is the degree of care exhibited in their keeping, and the risk of insufficient precautions must rest with the party claiming the privilege.[10]

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[10] See also Advisory Committee's Note to Proposed Federal Rule 503(a)(4): "Taking or failing to take precautions may be considered as bearing on intent" to preserve confidentiality.

We need not and do not here decide the extent to which a corporation or other business organization wishing to retain its privilege with respect to communications with its counsel must keep these in segregated files. In the corporate context, the issue is complicated by the fact that a corporation can act only through its agents; the question largely turns on whether, for purposes of the privilege, lower-ranking employees should be regarded as the

Cf. 8 Wigmore, *supra*, §§ 2325-26, at 633. It is not asking too much to insist that if a client wishes to preserve the privilege under such circumstances, he must take some affirmative action to preserve confidentiality. If Kasser had not wished to keep the communications between himself and his lawyers with him, he could have returned them to the lawyers. At the very least he could have directed Horowitz not to look at them. In contrast he treated the communications between himself and counsel on the same basis as all other records, with Horowitz, who was an independent contractor and not a servant, having a free run to look at what he pleased. It is apparent that Horowitz had the authority to look at any of the legal communications, many of which appear to deal with the tax and financial matters with which he was particularly concerned, if he thought that he might find something relevant to his preparation of Kasser's tax returns or other reports or his management of Kasser's finances during the latter's absence. Under the circumstances of this case, the confidentiality of communications between Kasser and his attorneys had come to an end.

III. *Privilege Against Self-Incrimination*

The point most strenuously pressed by the Kassers is that ordering Horowitz to produce the documents, other than those constituting corporate records, would violate their privilege against self-incrimination.[11]

"client" or as third-parties from whom confidential communications must be kept. See Simon, *supra*, 65 Yale L.J. at 982-85. Even if the latter be the case, determination whether there has been a loss of confidentiality may depend on the facts of each particular case. Lower-ranking employees may not as a practical matter have access to the files, or may lack authority to go through them; special precautions to preserve strict confidentiality may prove more burdensome than they would have been in this case.

[11] Since the government has not chosen to argue that this bald claim by the Kassers' lawyers was not a sufficient showing that any

Both sides contend that *Couch* v. *United States*, 409 U.S. 322 (1973), where the Court rejected a taxpayer's claim that the compelled production of her tax records from her accountant violated her Fifth Amendment privilege, rules the issue in their favor. The Government finds in *Couch* a ringing affirmation that the privilege exists only when compulsion to produce testimony is exerted directly upon an accused. Appellants, on the other hand, stress the Court's remarks concerning constructive possession and privacy. They point to the Court's reliance in *Couch* on the facts that the tax records had been regularly given to the accountant for many years, and had remained in his continuous possession. In contrast, they argue, Horowitz never had permanent possession of any of the records, but rather used some of them first at Technopulp's offices and later at the Lorraine Avenue office; others were personal records, some taken from Kasser's home, which were unrelated to Horowitz' role as an accountant. Moreover, they emphasize that the Lorraine Avenue office was rented on behalf of Kasser for the express purpose of maintaining the privacy of the records; they suggest that an analogy to the person

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of the documents, much less all of them, tended to incriminate, we need not consider whether the statement in *Brown* v. *United States*, 276 U.S. 134, 144 (1928), that

> In any event it was Brown's duty to produce the papers in order that the court might by an inspection of them satisfy itself whether they contained matters which might tend to incriminate. If he declined to do so, that alone would constitute a failure to show reasonable ground for his refusal to comply with the requirements of the subpoena.

has been deprived of all vitality, as it certainly has been attenuated, by such decisions as *Hoffman* v. *United States*, 341 U.S. 479 (1951), *Emspak* v. *United States*, 349 U.S. 190, 198 n.18 (1955), and *Malloy* v. *Hogan*, 378 U.S. 1, 11-14 (1964). See also McCormick, Evidence, § 139 (Cleary ed. 1972), and the discussion in *United States* v. *Reynolds*, 345 U.S. 1, 8-9 (1953). The Fifth Circuit recently approved an approach quite similar to that set out in *Brown*. *United States* v. *Roundtree*, 420 F.2d 845, 852 (5 Cir. 1969) (Wisdom, J.).

who keeps his records at home and allows an accountant to have access to them is appropriate here since Kasser, who had sold his home and did not have this option open, did what he viewed as the next best thing. While this case is indeed closer than *Couch*, we think the Government is right in arguing that *Couch* leads to affirmance.[12]

Mr. Justice Powell's opinion in *Couch*[13] is filled with references to the personal nature of the privilege. He thought it "important to reiterate that the Fifth Amendment privilege is a *personal* privilege: it adheres basically to the person, not to information which may incriminate him." (Emphasis in original.) This was followed by a quotation of Mr. Justice Holmes' statement in *Johnson* v. *United States*, 228 U.S. 457, 458 (1913): "A party is privileged from producing the evidence but not from its production."[14] After stating that "The Constitution ex-

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[12] It is well to observe that this appeal does *not* involve the issue, reserved in *Warden* v. *Hayden*, 387 U.S. 294, 302-03 (1967), and raised in recent decisions of the courts of appeals, compare *United States* v. *Bennett*, 409 F.2d 888, 896-97 (2 Cir. 1969), *cert. denied*, 402 U.S. 984 (1971); and *United States* v. *Blank*, 459 F.2d 383 (6 Cir.), *cert. denied*, 409 U.S. 887 (1972); with *Hill* v. *Philpott*, 445 F.2d 144 (7 Cir.), *cert. denied*, 404 U.S. 991 (1971); and *VonderAhe* v. *Howland*, 73-1 USTC ¶ 9333 (9 Cir., Mar. 1973), how far a possessor of incriminating documents who would be protected by the Fifth Amendment from their compelled production is protected by the Fourth Amendment from an otherwise lawful search and seizure.

[13] Mr. Justice Powell delivered the opinion of the Court on behalf of six Justices. Mr. Justice Brennan also joined the opinion, but "on the understanding that it does not establish a *per se* rule defeating a claim of Fifth Amendment privilege whenever the documents in question are not in the possession of the person claiming the privilege." 409 U.S. at 337. Two Justices dissented.

[14] We recognize that in *Johnson* the person claiming the privilege had transferred both ownership and possession of his books and records to his trustee in bankruptcy, who later produced them against him. But Mr. Justice Powell, who was well aware of this,

plicitly prohibits compelling an accused to bear witness 'against himself'," the opinion stated that "it necessarily did not proscribe incriminating statements elicited from another." Justice Powell then stressed that "Compulsion upon the person asserting it is an important element of the privilege," and that "It is extortion of information from the accused himself that offends our sense of justice." 409 U.S. at 328.

The opinion proceeded to point out that, in *Couch* as here, "In the case before us the ingredient of personal compulsion against an accused is lacking" since the summons and order "are directed against the accountant. He . . . is the only one compelled to do anything." "Inquisitorial pressure or coercion against a potentially accused person, compelling her, against her will, to utter self-condemning words or produce incriminating documents is absent." 409 U.S. at 329. *Boyd* v. *United States*, *supra*, 116 U.S. 616, was distinguished on the basis that there the production order was directed against the accused. Reference was made to *United States* v. *White*, 322 U.S. 694, 698 (1944), where the Court said that the privilege "is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or to force him to *produce and authenticate* any personal documents or effects that might incriminate him." (Emphasis supplied) In contrast, in *Couch* "there was no enforced communication of any kind from any accused or potential accused." 409 U.S. at 330-31.

This analysis flowed directly not only from the language of the self-incrimination clause, "No person . . . shall be compelled in any criminal case to be a witness against himself," but from its history, dating back to the sixteenth

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see 409 U.S. at 331-32 n.14, thought the quotation to be relevant in a case where the individual claiming the privilege still retained ownership.

century,[15] and from most of the Court's pronouncements concerning its policy. In *Brown* v. *Walker*, 161 U.S. 591, 596-97 (1896), the majority explained this as follows:

> [I]f an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, . . . made the system so odious as to give rise to a demand for its total abolition.

Mr. Justice Field, in dissent, said, in a statement that has been often quoted, 161 U.S. at 637:

> The essential and inherent cruelty of compelling a man to expose his own guilt is obvious to every one, and needs no illustration.

These concepts are the basis of Mr. Justice Goldberg's references, in *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 55 (1964), to "our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt" and "our fear that self-incriminating statements will be elicited by inhumane treatment and abuses." Such considerations are of no avail to appellants. The Kassers, at some remote and unknown location in Europe, bear scant resemblance to John Lilburne in the dock.

Appellants' reliance is on one of the seven considerations listed by Mr. Justice Goldberg in *Murphy:*

> our respect for the inviolability of the human personality and of the right of each individual "to a private

[15] See L. W. Levy, Origins of the Fifth Amendment (1968), *passim*. Doubtless the most famous and influential piece of history was the trial of John Lilburne, at the instance of Cromwell, in 1649. See *id.*, ch. X.

> enclave where he may lead a private life." *United States* v. *Grunewald*, 233 F.2d 556, 581-582 (Frank J., dissenting), rev'd 353 U.S. 391.

The relevance of Judge Frank's remark to the *Grunewald* decision was remote. Halperin, a bagman between persons under investigation for alleged tax frauds and their lawyers, on the one hand, and government employees ready to fix the investigations, on the other, had previously exercised his privilege before a grand jury; the question was whether he could be asked about this when he decided to forego the privilege and testify at trial. In reversing, *Grunewald* v. *United States*, 353 U.S. 391, 415-24 (1957), the Supreme Court made no reference to Judge Frank's "private enclave" phrase or, indeed, to his opinion. The majority's decision did not go on the basis that the reference at trial to Halperin's refusal to testify before the grand jury was an invasion of the privilege, compare 353 U.S. at 425-26 (concurring opinion of Justice Black, joined by Chief Justice Warren and Justices Brennan and Douglas), but on the ground that, since the inference that his testimony at trial was inconsistent with the exercise of the privilege before the grand jury was equivocal, the trial judge had abused his discretion in holding that the probative effect of the evidence outweighed its potentially prejudicial impact. See *United States* v. *Sobell*, 314 F.2d 314, 323-24 (2 Cir.), *cert. denied*, 374 U.S. 857 (1963). Again, in *Murphy* v. *Waterfront Commission*, *supra*, 378 U.S. 52, the issue was not the existence of the privilege but the scope of the immunity needed to overcome it.

Despite the eloquence of Judge Frank's phrase, the notion is difficult to accept in the context of the Fifth Amendment. Certainly "the right to a private enclave" lies at the core of the Fourth Amendment's strictures against law enforcement officers. Adopting a rational pattern, this gives the individual almost complete protection against the search and seizure of records of innocent ac-

tivity and permits the search and seizure of records believed to show the commission of crime only when a proper showing has been made. The self-incrimination clause of the Fifth Amendment admittedly affords no protection against compulsory process reaching into "a private enclave" to obtain non-incriminating evidence necessary to the proper determination of a judicial proceeding, see 8 Wigmore, Evidence § 2192, at 72; § 2286, at 528-31, however personal or confidential this may be. It seems a strange concept of a right to privacy that, although this does not protect the most sensitive communications against disclosure in court so long as they are innocent, it demands absolute immunity for incriminating testimony alone. Despite the repetition of Mr. Justice Goldberg's catalogue of reasons for the privilege in *Couch*, *supra*, 409 U.S. at 328, see also *Miranda* v. *Arizona*, 384 U.S. 436, 460 (1966); *Tehan* v. *United States ex rel. Shott*, 382 U.S. 406, 414 n. 12, 416 (1966), no Supreme Court decision has upheld a Fifth Amendment claim predicted solely, or even primarily, on the basis of an invasion of privacy, although Mr. Justice Douglas urged this in his dissent in *Schmerber* v. *California*, 384 U.S. 757, 778-79 (1966),[16] where the taking of the defendant's blood was surely a far greater offense to privacy than the subpoena of business records.[17]

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[16] While the precise basis for the rejection of the Fifth Amendment claim in *Schmerber* was that blood test evidence was not testimonial or communicative, 384 U.S. at 763-64, the majority opinion did state, 384 U.S. at 762, that

> "Compelled submission [to a blood test] fails on one view to respect the 'inviolability of the human personality.'"

but went on to observe that

> "The privilege has never been given the full scope which the values it helps to protect suggest."

Id.

[17] Although at argument appellants' counsel made repeated reference to "diaries," it seems clear that those here involved are merely business appointment calendars. Calling such papers "diaries" gives them no special sanctity.

When government has been forbidden to violate a reasonable expectation of privacy, *Katz* v. *United States*, 389 U.S. 347, 361 (1967) (concurring opinion of Harlan, *J.*), this has been in cases where its acts were held to have violated the Fourth Amendment,[18] not the Fifth. The essence of the self-incrimination clause remains what it has always been—the prohibition of the exercise of compulsion upon the person whose communications, oral or written, may tend to incriminate him, and thus avoiding "the cruel trilemma of self-accusation, perjury or contempt." *Murphy* v. *Waterfront Comm'n*, *supra*, 378 U.S. at 55.

It is true that Mr. Justice Powell in *Couch* acknowledged that a different result *might* be reached in cases where the loss of possession by the claimant of the privilege was "fleeting," as instanced by the hypothetical posed in the oral argument in which possession was lost only while being helped across a street, see 409 U.S. at 333 n.15, or where the "constructive possession" of the claimant was "so clear . . . as to leave the personal compulsions upon the accused substantially intact." 409 U.S. at 333. A sufficient reason for a different result in the hypothetical, a situation more likely to be encountered in law school classrooms than in real life, is that any other conclusion would trivialize the privilege. As for the "constructive possession" situation, Mr. Justice Powell neither defined the term in a Fifth Amendment context nor decided what the result would be when the definition was met. Given his insistence on the personal nature of the privilege, it seems highly unlikely that he was viewing the term as broadly as courts have done in other contexts, e.g., in applying the inference of knowledge of foreign importation formerly arising from possession of heroin under 21 U.S.C. § 174, see *United States* v. *Hernandez*, 290 F.2d 86, 90 (2 Cir. 1961). That

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[18] Or some general right of privacy thought to be derivable from the penumbras of various amendments, as in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), and its progeny.

the majority meant what it said in stating that it was merely leaving the question open appears from its refusal, 409 U.S. at 333-34 n.16, either to approve or disapprove a constructive possession claim on the facts of *Schwimmer* v. *United States, supra,* 232 F.2d 855,[19] or the decision of this court in *United States* v. *Guterma,* 272 F.2d 344 (2 Cir. 1959), where the facts were much stronger for the claimants than here.[20] Mere recognition that the privilege *might* be held to apply in some cases where the claimant is not in possession cannot be taken, as appellants urge, to tell us whether and in what circumstances it will. As. Mr. Justice Holmes said in *Johnson* v. *United States, supra,* 228 U.S. at 458, "Courts proceed step by step."

Even if a "constructive possession" sufficient to give rise to the Fifth Amendment privilege would sometimes be recognized, it would be hard to think of a poorer case for

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[19] The reference to *Schwimmer* must have been as a hypothetical since Schwimmer had raised no self-incrimination claim. See 232 F.2d at 859. When he later sought to add a Fifth Amendment claim, the court held that it had been waived. *Schwimmer* v. *United States,* 232 F.2d 866, 868 (8 Cir.), *cert denied,* 352 U.S. 833 (1956).

In *Schwimmer,* the appellant, an attorney, had retired from active practice, closed his office and moved out of the state. He had stored his files in the plant of the Dean Rubber Manufacturing Company. The subpoenas to produce the files were directed to the Company. Although the relationship of Schwimmer to the Company was not made clear by the court of appeals, the record indicates that the Company was simply the custodian of the records for storage purposes and had no knowledge of the contents of the files.

[20] Although the records of Guterma that were the object of the *subpoena duces tecum* were in a safe stored in the office of a corporation in which he was interested, and the subpoena was served upon the corporation, only Guterma and an indicted co-defendant knew the combination. This court held that under these circumstances, "it will still be Guterma who will have to deliver his own papers," 272 F.2d at 346, and placed its decision on that ground. Here the Kassers are not being required to do anything.

recognition than this one. The Kassers have not had actual possession of the records for two years, have never had actual possession of them in their present situs and, from all that appears, do not expect to have it in the near future. It is Horowitz who has both actual possession of the files and complete access to them, facts which, in this context, are inconsistent with the Kassers' claim of constructive possession.[21] It cannot be seriously contended here that the "personal compulsions upon the accused [are left] substantially intact." See *United States* v. *White*, 73-1 USTC ¶9362, at 80,838 (5 Cir., April 17, 1973).

The district court is directed promptly to amend its order with respect to the scope of the *subpoena duces tecum* as indicated in Part I of this opinion. As so modified, the order will stand affirmed. The stay will be extended for ten days from the filing of this opinion and if an application for a further stay is filed with the Supreme Court within that period, until the determination thereof. No costs.

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[21] The Government suggests that the validity of a subpoena served upon one who has possession of or access to the books and papers of another, as against the constitutional claims of the owner, may turn on whether the person served has sufficient control over the papers to warrant issuance of the subpoena to him. The Court in *Couch* also intimated that this may be an important consideration. 409 U.S. at 334 n.18. In this case, Horowitz' control over the records was complete; he was not only *an* appropriate addressee of the subpoena, but by far the *most* appropriate one.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

72 Misc. M-11-188

IN THE MATTER OF A GRAND JURY SUBPOENA DUCES TECUM SERVED UPON SIMON HOROWITZ, AN ACCOUNTANT

Order

UPON the motion papers submitted by Herbert J. Miller, Esq., Counsel for Alexander Kasser and William Hundley, Esq., Counsel for Simon Horowitz, to quash a grand jury subpoena duces tecum served upon Simon Horowitz, an accountant, and upon the motion papers submitted in opposition by James Schreiber, Assistant United States Attorney; and

UPON, the testimony given by Simon Horowitz, and an attorney named Joel Mallin, Esq., at a hearing held on March 21, 1973;

IT IS HEREBY ORDERED that Simon Horowitz and Joel Mallin, Esq. forthwith turn over to the Grand Jury, the United States Attorney or any agent of the United States designated by the United States Attorney, the entire contents of the three file cabinets previously located at office #4, 248 Lorraine Avenue, Montclair, New Jersey, with the following limited exceptions:

a. The personal wills of Alexander and Elizabeth Kasser

b. Trust agreements of Alexander and Elizabeth Kasser

c. Patents owned by Alexander and Elizabeth Kasser.

d. Letters of Aleander or Elizabeth Kasser which are strictly personal; and

IT IS HEREBY FURTHER ORDERED that should a dispute arise about whether any documents fall within the above limited exceptions, they shall immediately be submitted to the Court for *in camera* inspection; and

IT IS HEREBY FURTHER ORDERED that the aforesaid documents which are turned over pursuant to this order be subject to usual safeguards of Grand Jury secrecy and not be disclosed to Canadian criminal authorities unless under proper motion, with notice to the moving parties herein; and

IT IS HEREBY FURTHER ORDERED that the effect of this order is stayed until 9 a.m. Thursday, April 19, 1973 and no later.

SO ORDERED:

/s/ MILTON POLLACK
U.S.D.J.

April 12, 1973

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

73 Misc. M11-188

New York, N. Y.
March 28, 1973—4:00 p.m.

IN THE MATTER OF A GRAND JURY SUBPOENA DUCES TECUM SERVED UPON SIMON HOROWITZ

BEFORE: HON. MILTON POLLACK, District Judge

APPEARANCES:

WILLIAM G. HUNDLEY, Esq.
Attorney for Simon Horowitz

HERBERT J. MILLER, JR., Esq.
and
MICHAEL A. LACHER, Esq.
Attorneys for Alexander and Elizabeth Kasser

WHITNEY NORTH SEYMOUR, JR., Esq.
United States Attorney
For the Government

By: JAMES SCHREIBER, Esq.
Assistant United States Attorney

[2] MR. HUNDLEY: If the Court please, before we start I would like to give the Court a copy of the inventory in this case prepared by Mr. Horowitz and myself.

MR. MILLER: My name is Herbert J. Miller, Jr. I represent the movants. I would like to call as the first witness Simon Horowitz.

SIMON HOROWITZ, residing at 8206 256th Street, Floral Park, New York, called as a witness by the movants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MILLER:

Q. What is your occupation, Mr. Horowitz? A. I am a certified public accountant.

Q. Where? A. In the City of New York.

Q. Do you have offices in the City of New York? A. Yes, I do.

Q. What is your professional address? A. 275 Madison Avenue, in New York.

Q. How long have you been a certified public accountant? A. Oh, since 1941.

Q. Do you practice by yourself or in partnership? A. No, I am in a partnership.

[3] Q. What is the name of the partnership? A. Horowitz and Ullmann.

Q. How many members of the firm? A. Two members of the firm.

Q. Did there come a time when you commenced to represent Dr. Alexander Kasser and Mrs. Elizabeth Kasser in accounting and tax matters? A. Yes.

Q. Do you remember approximately when that was? A. Oh, about 19—early 1950's.

Q. Did there come a time when you were served with two grand jury subpoenas to produce certain records before the grand jury sitting in the Southern District of New York? A. Yes.

Q. I hand you, sir, Movants' Exhibit 1 for identification. Would you tell me what that is? A. Yes. That is a copy of the subpoena served on me.

Q. When was that served upon you? A. Oh, about the end of July, July 27, 29.

Q. What year? A. 1972.

Q. Did you produce any documents pursuant to that subpoena? A. No. I didn't have any documents to produce.

[4] Q. I hand you Movants' Exhibit 2 for identification. Could you tell me what that is? A. That is the subpoena served upon me on July 28, 1972.

Q. Does that subpoena call for the production of certain items? A. Yes, it does.

MR. MILLER: Your Honor, at this time I would like to move into evidence Movants' Exhibits 1 for identification and 2 for identification.

MR. SCHREIBER: No objection, your Honor.

(Movants' Exhibits 1 and 2 received in evidence.)

Q. I place Exhibit 2 before you, Mr. Horowitz. Did you produce any documents pursuant to that subpoena? A. No, I did not produce any documents, but I complied with the subpoena.

Q. How did you comply with the subpoena? A. Well, the items in question are file cabinets here, which were delivered to the U.S. Attorney's Office.

Q. By whom? A. Well, effectively by me. They were transported with help to the U.S. Attorney's Office here.

Q. Tell me, what was turned over to the Government pursuant to Exhibit 2 which you have before you? [5] A. Exhibit 2?

Q. In other words, what did you provide the Government after that subpoena was served upon you? A. Three file cabinets.

Q. What were contained in those file cabinets? A. Various documents, papers, records.

THE COURT: That is completely uninformative.

A. There were a lot of papers in there. Some of the papers there were items given to me by my client for safekeeping.

Q. Who is your client? A. Alexander Kasser and Elizabeth Kasser. A lot of the papers in there were items given to me by my clients for safekeeping. As a matter of fact, all of those records were given to me for safekeeping in those cabinets.

BY THE COURT:

Q. Where did you place the records when you got them for safekeeping? Where did you place them? A. Well, the cabinets in question—in the cabinets in question.

Q. Are these open cabinets, locked cabinets? A. No, they are locked cabinets.

Q. Who had the keys to the cabinets? A. Well, one key was in the possession of my clients' [6] son, Michael Kasser, and the other key I had in my possession.

Q. Where were they physically located? A. They were located in an office in Upper Montclair, New Jersey.

Q. Whose office was that? A. Well, the office was in the name of Joel Mallin.

Q. Whose office was it? A. It was—I considered it to be my clients' office.

Q. Whose office was it in fact? What business was transacted in that office? A. I went there occasionally to work on those records, to use those records.

Q. You mean in the course of your accounting work for Mr. Kasser and Mrs. Kasser? A. Sometimes in the course of my accounting work and sometimes to put a document in. But primarily it was a place for safekeeping of the records.

Q. What business was transacted in the office and by whom? A. The business transacted in the office was my working there occasionally.

Q. In other words, except for a place where you worked, nobody else occupied the office? A. Nobody else occupied the office.

[7] Q. Nobody else utilized the offiffice? A. To my knowledge, nobody else utilized the office.

Q. You had the only key to the premises? A. No, there were two keys, as I stated. I had one key and Michael Kasser, my clients' son, had another key.

Q. You were referring to the cabinets, not to the office, when you were mentioning the keys. Who had the key to

the front door? A. I had one key and Michael Kasser had a key.

Q. Who had the lease? A. The lease? Joel Mallin had the lease.

Q. You say this was your office? A. No, I considered it to be my clients' office.

Q. Why did you place the cabinets in an office in the name of Joel Mallin? A. At the request of my client, it so happened that my client was—did not want his records to be unlawfully or otherwise attached or seized, and he told me he had a conversation with Joel Mallin, and it was agreed that an office would be taken in Joel Mallin's name. I obtained the lease at my client's instructions from the landlord, I delivered the lease to Mr. Mallin, it was signed. I at the instructions of my client brought cabinets and a desk and some chairs and other office equipment, which was paid for by [8] Mr. Mallin. I understand that he was reimbursed for it by my client. And the records were put into safekeeping in the office.

Q. Is Mr. Mallin a lawyer? A. Yes.

Q. Is a member of the bar?

Mr. Schreiber: Your Honor——

A. Well——

Q. Is he a member of some bar? A. I would assume so.

Q. Of what state? A. I would assume New York. I have no direct knowledge of that.

Q. Is Mr. Mallin a member of the New Jersey bar? A. I don't know.

Q. You said that these records were kept in a lawyer's office. He is not a lawyer in New Jersey, is he? A. I don't know.

Q. Who drew the check for the rent? A. Mr. Mallin.

Q. Have you ever seen those checks? A. Yes, I have seen them.

The Court: Go ahead.

MR. SCHREIBER: If your Honor please, Mr. Mallin [9] is in court, and I would ask your Honor to have him excluded for the duration of this testimony.

THE COURT: Mr. Mallin, I think that you will have to excuse us for a while.

(Mr. Mallin left the courtroom.)

THE COURT: Go ahead.

Q. It is a most unusual situation. What you are in effect saying to me is that your clients wanted to conceal these records from somebody and utilized Mr. Mallin and yourself for that purpose. Is that what you are saying? A. Well, that is what happened. He did want to conceal the records.

Q. From whom was he seeking to conceal them? A. From the Canadians.

Q. Canadian authorities? A. Canadian people in Manitoba.

BY MR. MILLER:

Q. Mr. Horowitz, directing your attention to July of 1971, could you tell the Court what transpired which led to the rental of this office? A. Yes. In July of '71 I was informed that some agents of the Manitoba government had entered the offices of a Canadian company and had seized records and had threatened to blow up the safe it it weren't opened and had taken [10] records from that office.

MR. SCHREIBER: Your Honor, could we have who he was told by?

THE COURT: If it is not brought out on direct, you will bring it out on cross. Make a note for yourself.

Q. Do you recall who informed you of this? A. I got a call, I think it was from Mrs. Tannean, who was working in that office or who was an officer of that company, that that had happened.

Q. After you received this information, did you inform anyone of these facts? A. Yes. I informed Michael Kasser, my client's son.

Q. Did you inform anyone else? A. Yes. Michael Kasser managed to put a call through to his father, who was out of the country, and we both spoke to Mr. Alexander Kasser.

Q. What directions if any did Mr. Kasser give upon hearing this information? A. Well, upon hearing this information, Mr. Kasser told us that he did not——

BY THE COURT:

Q. Told whom? A. Told Michael Kasser and myself.

Q. Did he talk to you personally? [11] A. Yes, on the telephone.

Q. Just relate the personal conversation with you. A. All right.

Q. And give the date and the manner in which it was communicated. A. Well, I think it was a time when both Michael Kasser and I were on the phone at the same time talking to him.

BY MR. MILLER:

Q. Do you remember the approximate date, sir? A. It was probably July 14 or 15.

Q. Is there any way you can fix that date or have fixed it? A. I think it was July 14.

Q. What year? A. '71, 1971.

Q. In this conversation with Dr. Alexander Kasser was this in person or on the telephone? A. On the telephone.

Q. In the course of this telephone conversation did he make any directions or suggestions with respect to these records? A. Yes. He said that he did not want his records seized in a manner that records in Canada were seized. He said that certain—the Manitobans had attempted to attach [12] and did attach bank accounts of a related company of his, and it was his instruction that the records be removed from the Park Street office and be put into his son's apartment—his son had an apartment in Montclair, New Jersey—until such time as a safer place could be found for them.

Q. What is the Park Street you referred to? A. Park Street is the offices of Kasser and his related companies.

Q. What records were located at Park Street generally at the time of this telephone conversation? A. A lot of Alexander Kasser's records, Elizabeth Kasser's records, a lot of his private files, records of some of his related companies, personal data of his.

Q. Did you take any steps pursuant to the telephone conversation with Dr. Kasser with respect to these records? A. Yes.

Q. What did you do? A. Michael Kasser and I removed documents, papers and files from 26 Park Street and took them over to his apartment.

Q. Whose apartment? A. Michael Kasser's apartment.

Q. When was this done? A. Oh, within a day or two of the time we learned of [13] the seizure of the records in Canada.

Q. Who physically transported the records? A. Michael Kasser and I.

Q. Did you use an automobile or a truck or how? A. It was in an automobile.

Q. Did the records remain in the apartment of Michael Kasser? A. No.

Q. What was done with them and when? A. As soon as the office was leased in Upper Montclair and ready for occupancy, the records were transported from Michael Kasser's apartment to that office.

Q. Mr. Horowitz, with respect to your saying as soon as the office was leased, what office are you referring to? A. I am referring to an office, No. 4, at 248 Lorraine Avenue in Upper Montclair, New Jersey.

Q. Could you give us the circumstances as to how that office was found and leased, please? A. Alexander Kasser felt that——

MR. SCHREIBER: I object to what he felt. He can testify to what he said.

THE COURT: I will accept it subject to motion to strike out. Go ahead.

A. Alexander Kasser indicated to me, said to me, that [14] he did not want the records kept permanently in Michael Kasser's apartment, because on some occasions Michael Kasser would have visitors there. So he and I—and he also told me he had spoken to Mr. Mallin about taking an office in Mr. Mallin's name. And he and I looked for an office, and I located one, we located one, and, as I said before, a lease was obtained, it was signed by Mr. Mallin, furniture was purchased, and shortly after that the records were moved into 248 Lorraine Avenue in Upper Montclair.

Q. Did Dr. Kasser located the office or did you or was it a joint effort? A. It was a joint effort. But he approved it. I think there was an advertisement in the paper. He saw it. He approved it.

BY THE COURT:

Q. Basically, did these records contain the kind of information that would be required for tax reports and government reports? A. Some of those records were, yes.

Q. And those were basically the records that over the years you utilized in preparing and checking the tax returns for Kasser and the fleet of his companies; is that right? A. That's right. But not all the records were of that [15] nature. There were a lot of personal records of Dr. Kasser.

BY MR. MILLER:

Q. Mr. Horowitz, when you were performing, working for the Kassers as an accountant, where did you physically perform your work? A. Well, for the four or five years prior to that event in 1971, practically all the records of Kasser were located on his premises and I worked on his premises in doing my work, and very few records were kept in my office if any.

Q. When you say "his" premises, what premises are you referring to? A. 26 Park Street, and an office—he had a prior office on Valley Road.

Q. Do you remember the address of the Valley Road? A. 615 Valley Road in Upper Montclair.

Q. When the records were kept at the Technopulp office at Valley Road, how would you obtain access to these records in order to obtain tax information, tax returns, and information for government returns? A. Well, the records were on the premises, and when I came in to work they were accessible to me.

MR. SCHREIBER: Your Honor, we had some talk about what his practice was for four or five years before. Can we have a time limit specified as to how his practice was when [16] he followed this practice?

THE COURT: You ask that on cross-examination.

Q. When did this practice of working on the records, primarily in the office of the client, commence, to the best of your knowledge? A. Well, it gradually increased more and more, but I would say about, oh, 1965, '66, or thereabouts, maybe '67. It was a gradual thing.

Q. Did you prior to this event that we have discussed in 1971, prior to July of 1971, maintain records of Dr. or Mrs. Kasser or their companies in your professional offices in New York City? A. No.

Q. Did you ever have such records in such offices? A. Yes. I did have some records in my office on occasion when it was necessary for an Internal Revenue Service audit. But never permanently.

Q. Did you have the power of attorney for Dr. and Mrs. Kasser to negotiate with IRS? A. Yes.

Q. Directing your attention to July of 1971, at the time you received this telephone call about the Manitoba seizure of records, did you have any of Dr. Kasser's or Mrs. Kasser's records in your office in New York City, if you [17] recall? A. Yes, I did.

Q. For what purpose were those records there? A. We were in process of auditing the Kassers' tax returns, and I had brought records in to meet with the Internal Revenue Service agent at my office, and they were there at that time pending a meeting.

By the Court:

Q. What years were under review? A. The years that were under review were, at that time, were '68—1968 and 1969.

By Mr. Miller:

Q. Had you in fact had meetings with Internal Revenue Service with respect to those records? A. Yes.

Q. What did you do with those records that were in your office? A. Well, at Dr. Kasser's instructions I removed them from my office and brought them over, and they ultimately wound up in 248 Lorraine Avenue office.

Q. For the record, could you explain to me your modus operandi for the period of, say, the last six years, and how you performed your accounting services for Dr. and Mrs. Kasser or their company, insofar as to how you prepare returns [18] and do you make worksheets, and that type of thing? A. Yes. I performed my services during that period in Montclair, at Kasser's and his company's offices in Montclair, either 615 Valley Road or later on at 26 Park Street. The records were there and I did my work there. And tax returns were prepared there. And if at any time records were taken from there and brought to my office, they were there either to show to the Internal Revenue Service or for the purpose of checking a tax return or something, or completing something, but there were no records during that period mentioned kept permanently in my office.

By the Court:

Q. Didn't you keep your own worksheets? A. No, I kept them at Montclair because they were needed for reference. I spent quite a bit of time there——

Q. Are these in your handwriting or in the handwriting of your partner or some employee of your office? A. Some of them are in my handwriting. Primarily the great bulk of them were in my handwriting.

Q. They were your extracts from other records on which you analyzed the materials that you needed to incorporate in returns and other business purposes; isn't that right? A. That's right. But a lot of the documents were not in my handwriting to the extent that they were information [19] furnished—that were available from the records there or schedules that had to be attached to tax returns or information as to foreign corporations that were given to me. There were some worksheets in my handwriting, whatever worksheets were necessary.

Q. But all of it was furnished to you in connection with your professional services for the Kassers and the fleet of corporations owned by the Kassers; isn't that right? A. In that area, yes. But, as I said, there are a lot of personal records that had nothing to do with my work as an accountant, which I was given for safekeeping.

Q. Were they financial records or were they of a testamentary character or some other personal character? A. They were records of a testamentary character; they were records of a personal nature.

Q. What personal nature? A. Well, if I got a file of Dr. Kasser's was given to me and he said, "Keep this for safekeeping, it's my personal file"——

Q. But what was in those personal files? A. I don't know.

Q. Other than material relating to social correspondence or family matters? A. There were files there that I didn't even know what [20] was in it. I mean, they were a personal file and given to me for safekeeping.

Q. Didn't you utilize those files in the course of your professional work? A. Not all of them.

Q. To the degree that you utilized them, what did you use material regarding family matters for? A. Material re-

garding family matters, if they had to do with tax returns or income tax, I utilized them.

Q. And gift taxes? A. Gift taxes, yes. I filed gift taxes.

Q. And excise taxes of one form or another? Doing-business forms? A. Yes, I believe there were some New Jersey doing-business forms.

Q. So that when you talk about personal records, what you are talking about are records pertaining to Mr. Kasser or Dr. Kasser as a person rather than something of a private nature; isn't that so? A. Your Honor, there were records of a private nature there. For instance, there was his will and Mrs. Kasser's will, which had no relevance to my preparing income tax returns.

Q. Did it have a relevance to your advance on estate [21] planning? A. No, no.

Q. Didn't you advise Dr. Kasser and his wife on estate planning? A. No.

Q. You were not consulted as to how he should set up his estate plan from the viewpoint of your accounting work? A. I think his attorneys advised him on that.

Q. Were you called in to render assistance in that respect? A. Only perhaps to make a summary of his assets or something like that.

Q. And his assets became the subject of the wills? A. I don't know. I never read his wills.

Q. Did he give you his original will in those papers? A. I think there was an original will that he asked me to put in a safe for safekeeping.

Q. But you did not include that original will in the papers that you sent to Upper Montclair, did you? A. Yes.

Q. The original signed will? A. I wouldn't swear to it, but it is my impression it is an original will.

THE COURT: Go ahead, Mr. Miller.

[22] BY MR. MILLER:

Q. Did you perform any functions for Dr. and Mrs. Kasser other than acting as an accountant? A. Yes. I handled

his bank accounts; I have signature rights over his bank accounts. Primarily it's hard to distinguish, but I spent quite a bit of time there, and he asked me, like I said, to put stuff away for safekeeping. And that was it.

Q. Did you ever make investments on his behalf? A. On his instructions, I bought—and on his authority, I bought occasionally certificates of deposit or banker's acceptances.

Q. You testified, as I understand it, that the records from your office and records from Technopulp eventually ended up at this office at 248 Lorraine Avenue. A. Right.

Q. Do you know if records of any other source were placed in that office at 248 North Lorraine? A. Yes. I think I remember that Dr. Kasser gave me records that he took from his home and asked me to put it into safekeeping. There are a lot of folders given to me late in July of '71, which he said, "This you hold for me; this is for safekeeping."

Q. What did you do with those records? [23] A. They were put into the cabinets of Lorraine, 248 Lorraine.

Q. For the purposes of the record, the documents that you have testified as being deposited at 248 North Lorraine, were those the documents which were placed in the three file cabinets which were turned over to the grand jury? A. That's correct.

Q. Physically how do you prepare tax returns? How did you prepare tax returns for the Kassers? A. The——

Q. And how many copies of the return did you make? A. Well, a pencil copy of the return was prepared.

Q. By you? A. By me.

Q. Where would you do this work? A. In Montclair.

Q. Where in Montclair? A. Well, either at 26 Park Street or at 248 Lorraine.

Q. What happened after you prepared the penciled copy? A. After I prepared the penciled copy and all the attachments and everything, either one of my men would, if there was some work for him to do at Montclair, would come out and check it or might bring it in to my office to be [24] checked for arithmetical calculation, and two Xerox copies

would be made—one copy which was filed with the Internal Revenue Service, another copy for the client, and of course the original pencil copy.

Q. Where was the original penciled copy kept for filing? A. In Montclair.

Q. Where at Montclair? A. 26 Park Street and later on at 248 Lorraine.

Q. Do you know who in fact made payments for the rent, the utilities, and the furniture for 248 North Lorraine? A. Joel Mallin.

Q. Do you know if Mr. Mallin was reimbursed? A. Yes, I understand he was reimbursed.

Q. By whom? A. By Dr. Kasser.

MR. SCHREIBER: I object to this hearsay, your Honor; ask it be stricken.

BY THE COURT:

Q. You were in charge of Dr. Kasser's bank account. Did you draw the checks? A. Yes. Mr. Mallin rendered an invoice for expenses and he was reimbursed.

Q. So that you and not Dr. Kasser made out the checks [25] to Mr. Mallin; isn't that so? A. But they were—yes, but from his bank account.

Q. Certainly. You used Dr. Kasser's bank account, but you were the paymaster, weren't you? A. No, only on authority to pay. I never paid without authority.

Q. The impression that you almost gave me was that Dr. Kasser was paying for these things instead of you. A. Well, he was paying in the sense that his money was being used, it was his check and his money.

Q. He gave you carte blanche to use money for that purpose, didn't he? A. No bills were paid unless they were approved.

Q. In advance? A. Well, if the rent was so much a month and he said it's OK——

Q. Did you ever send a bill to him to get it OK'd and returned to you with an OK for payment? A. No, but——

Q. Did you ever send any bills that were paid to Dr.

Kasser for his review? A. Well, Michael Kasser took over Dr. Kasser's functions—Michael Kasser, his son. And Michael Kasser had authority to approve bills.

[26] Q. That is not my question. My question is: Did you gather the bills together and hand them over to Michael Kasser and get his OK on any of those bills? A. With respect to the—your Honor, I would just want to clarify something. The bills—the reimbursement for Mr. Mallin for his expenses for the office was included on Mr. Mallin's invoice and it was paid with Dr. Kasser's approval. Now, either Michael Kasser told me that he took it up with his father and it was OK to pay it or, I don't remember exactly, maybe I was told directly to pay it. But my impression was that I was instructed by Dr. Kasser that with respect to his personal bills I should get approval from Michael Kasser to pay it.

Q. Did you ever at any time, in advance of drawing a check, submit the bills or any bills to Michael Kasser? A. Yes. As a matter of fact, I——

Q. Did you do that with Mallin's bills? A. Yes.

Q. Is there anything on the bills to indicate any such approval? A. I don't know. I'd have to look at the bills.

Q. Is there any correspondence between you and Michael Kasser to indicate any such practice? A. No, there is no correspondence, because he was [27] right there, and if he approved the bill he approved it. And, as a matter of fact——

Q. What was the business of Michael Kasser? A. Michael Kasser was president of Technopulp, Inc., Technopulp Machinery. As a matter of fact, your Honor——

Q. You say he was right there where you were? A. Well, he was in the office at Montclair.

Q. Is there any reason why Michael Kasser was not given the power of attorney to sign his father's checks and you were? A. He was given the power of attorney to sign his father's checks.

Q. Did he sign these checks? A. He may have. As a matter of fact, most of the checks were not signed by me for those purposes; they were signed either by Michael Kasser—they may have been signed by me on occasion. There are other people in the office who had authority to sign too.

Q. Now you have me confused. A. I am sorry, your Honor.

Q. I thought you told me that you were drawing the checks on this bank account, and now you are telling me that somebody else drew the checks on the bank account? A. No, I said that, if I may so, your Honor, that [28] I had authority to sign checks on Alexander Kasser's account, and I didn't mean to imply—if I did, I am sorry—that I wasn't the only one who had authority to sign his checks.

Q. What kind of checks did Michael Kasser sign, what categories? A. He signed checks for Technopulp Machinery, he signed checks for Technopulp, Inc., he signed checks for his father's account.

Q. What for his father's account? What obligation was for his father's account? A. Oh, there were expenses to be paid.

Q. What kind of expenses? A. Medical expenses, personal bills, various bills having to do with it.

Q. Weren't those bills all handed over to you so that you could compile them and prepare a list of them and pay them? A. No, there are bookkeepers there who handle that. I wasn't the bill-paying person.

Q. As we have it now, it seems to me that it is too vague and indefinite to know exactly what your functions were. You say some of this and some of that and some of the other, and I have no clear understanding of the expansiveness or the contractive nature of what you are talking about. [29] Certainly the matters that related to his investments and his finances went through your hands; isn't that so? A. The matter that related to earning interest on his money, I had instructions to earn interest on his money. And re-

lating to his bank accounts, in which those funds existed, were handled by me on his specific instructions.

Q. Can we agree on this: that any matter that ultimately would be reflected either as an item or a factor in a tax return went through you? A. I would like to respectfully explain that all items that on on a tax return did not go through my hands in the sense that bills were paid, because there were routine bills paid by his bookkeeper and the company's bookkeeper. That information——

Q. Did the company's bookkeeper have check powers on signatures? A. The company's bookkeeper has power to sign on two of the corporations.

Q. I am not talking about corporate accounts now. I am talking about personal accounts. Corporate accounts are in a different category and corporate records are in a different category. A. All right. Personal accounts of Alexander Kasser and Elizabeth Kasser: Michael Kasser had signature rights [30] on his mother's and father's personal accounts. I believe Dr. Kasser's daughter has signature rights. I have signature rights on the personal accounts. The bills were handled, they were approved by Michael Kasser, the checks were written out by the bookkeeper, and the bookkeeper, if Michael Kasser was around, would give him the check to sign; and if he wasn't around, would give me the check to sign. And if I had proper approval, or if it was a special check I would question the bookkeeper or question Michael Kasser if the payment was proper.

Q. But the nature of the items that you vouched for were items that would be reflected in a business transaction or tax return for the Kassers personally. Isn't that so? A. Not necessarily. It might have been items of a personal nature. If they bought an item that wasn't either a tax deduction or had nothing to do with the business, it still was paid from that account, even though it wasn't an item deducted on the tax return. I don't mean to be petty or argumentative.

Q. You are not informative, and I am not saying that you are argumentative. A. Well, I would like to help, to be more informative. I will try to answer your questions as best I can.

[31] Q. I will have to have some specification, because I am getting a broad sweep of the brush, and I don't know where the limits are of what you have to say.

THE COURT: Do you have a point at which you can stop? I have a jury coming in.

MR. MILLER: Why don't we stop right here, your Honor.

THE COURT: Is this a convenient place?

MR. MILLER: Yes.

(Recess)

MR. MILLER: Does your Honor have the inventory that was handed up earlier?

THE COURT: Yes, sir, right here.

MR. MILLER: I wonder if I might have it.

(Movants' Exhibit 3 marked for identification.)

BY MR. MILLER:

Q. I hand you Movants' Exhibit 3 for identification. I wonder if you could tell me, describe for the Court, what that is, Mr. Horowitz. A. Well, it says this is an inventory of the three file cabinets formerly located at 248 Lorraine Avenue——

THE COURT: Mr. Horowitz, the court reporter has to hear you.

A. Did I go too fast?

THE COURT: It is an inventory of the materials [32] that are in the possession of the United States Attorney; isn't that what it is?

MR. MILLER: Yes, sir, and which formerly were——

THE WITNESS: Which formerly were in the office at 248 Lorraine Avenue.

Q. Mr. Horowitz, did you prepare all or a part of Exhibit No. 3 for identification? A. I prepared part of it.

Q. Could you describe how you prepared that part which you did in fact prepare?

MR. SCHREIBER: Could he describe what part he prepared, first?

Q. All right, what part did you prepare? A. The part that has an initial "S" in front of it. They are itemized. In other words—there are categories here, and each one has an "S" in front of it. And then they stop at a certain point. I believe they stop here.

Q. Is it your testimony that where there is an "S" prior to the number and the inventory item, that that inventory was made by you? A. Yes. I would have to look at each item, but it seems to me that it was.

BY THE COURT:

Q. Does that "S" mean something about the source from [33] which the papers came? Does it mean that they came from your office? A. No. I think "S" is just an indication that I wrote out on the inventory sheet, it was my inventory up to this point.

Q. In other words, you made the description on the inventory sheet? A. Right.

Q. Is that what that "S" means? A. Yes. Yes, I did.

BY MR. MILLER:

Q. If you know, who prepared the balance of that inventory? A. Mr. Hundley.

Q. Who is Mr. Hundley, for the record? A. My attorney.

Q. Could you explain to the Court why you did not finish the inventory? A. Yes. I became ill and I was sick and could not go back.

Q. Where did you physically make that part of Exhibit 3 for identification that you prepared? A. In the U.S. Attorney's office, Mr. Schreiber's office.

[34] Q. In the course of preparing the inventory, did you see records which were related to legal matters or the lawyers with whom Kasser dealt? A. Yes, I think so.

Q. Did you see other personal items as listed in the inventory? A. Yes, I think so. I would have to look through.

Well, take the first item. It says the Kasser cash book——

MR. SCHREIBER: Can we get that in evidence first, your Honor?

THE COURT: What is that?

MR. SCHREIBER: Can we get this in evidence before he reads it?

THE COURT: That is technical. It is here now. We know this is the inventory. Go ahead. It is labeled S-1?

THE WITNESS: S-1.

BY THE COURT:

Q. What does it say? A. It says Kasser cash book and general ledger, 1967, 51 sheets. That is a record of Kasser's receipts and disbursements, obviously for the year 1967.

Q. Prepared by whom? [35] A. By his bookkeeper.

Q. It was not anybody from your office staff, was it? A. It may possibly have some—I may have made a summary or two, I don't know. I would have to look at the ledger.

Q. Wasn't that the summary that you took off the checkbook for your tax return purposes? A. No. Because the actual book was written up by whoever was the bookkeeper at that time.

Q. Was that the actual book, S-1 the actual book? A. It says Kasser cash book. I would assume it is. It was a ledger, and some of it may have been in my handwriting and a lot of it was not, and it contained not only business or, rather, deductible items for tax purposes, but also a lot of personal expenses that had nothing to do with taxes. And item S-2, which reads Kasser journal and cash book, 1965, 25 sheets, some blank sheets, general ledger '66, is of the same nature as item S-1.

Item S-3, which reads Kasser general ledger, 1965, 44 sheets, is again of the same nature.

Q. Did you find that pro forma of the tax return, of Kasser's personal tax return, as you had prepared it, in

that batch of material with the letter "S" against it? A. Well, there are forms—here is a folder containing [36] Form 959—that is a form number used—an information return filed with the Internal Revenue Service, not specifically a tax return but it is of that nature, for Kasser, and item S-5. All those 959 forms filed by Kasser—there are several here on the list. There is a letter from Kasser to Reiser, which is of a personal nature.

Your specific question was as to tax returns. Items S-11 reads in part: "Documents received from or relating to Kasser tax return backup material re"—certain corporations which have to be attached to his personal tax return.

THE COURT: Go ahead.

BY MR. MILLER:

Q. Do you know what years, how far back in time, how old some of the records are that are in these file cabinets? Do you know what the date of the earliest records is in these file cabinets? A. I think there are some records in there going back to the early fifties.

Q. Do you know what type of records they are? A. I think there is a private file of Kasser's, which was given to me for safekeeping, which goes back to 1951. It has to do with some old transaction that he had. There are a lot of papers in it. I don't know exactly what they [37] are, but it was a bulky thing. I don't see it on here yet, but I recall that it was in the cabinets.

Q. Are there many records in the three file cabinets that we are discussing which you never used in the preparation of any returns or information returns to the Government?

MR. SCHREIBER: I object to the question.

THE COURT: Overruled.

A. Yes, there are quite a lot of records that were never used in the preparation of Kasser's tax returns.

MR. MILLER: I have no further questions.

MR. SCHREIBER: May I proceed, your Honor?

THE COURT: Yes.

CROSS EXAMINATION

BY MR. SCHREIBER:

Q. Mr. Horowitz, you don't assert any personal privileges of your own in connection with the subpoening of these records, is that correct? A. Personal privilege of my own?

Q. Yes. A. No.

Q. In other words, you are not saying the records in these—— A. Oh, unless there is——

[38] Q. —cabinets would incriminate you, do you? A. May I go back to your first question. I haven't gone through this inventory; I only prepared part of it. If there is anything of mine there of a personal nature, I don't know whether to assert a privilege or not. I don't know if there is.

Q. But do you assert that any of the records in those file cabinets would tend to incriminate you in any way? A. No.

Q. You have your own firm, is that right, called Horowitz and Ullmann? A. That's correct.

Q. You said they are two partners, is that right? A. That's right.

Q. How many other people do you have working for you? A. We have four other accountants.

Q. What about staff, assistants, secretaries? A. Two secretaries.

Q. So in total there are eight people employed in connection with the firm of Horowitz and Ullman; is that correct? A. That is correct.

Q. How old is that firm? How long ago was that established? [39] A. The partnership was formed in 1953. I am not positive of the year, but I think it was 1953.

Q. Has that been in existence since that time up to the present date? A. That's right.

Q. What percentage of your business, your firm's business, would you say is Kasser-related? A. For the past few years, four or five years, I would say it ranges 20 to 25 percent.

Q. Approximately 20 percent of the firm's business is Kasser-related? A. 20 to 25 percent.

Q. It is not exclusively Kasser, is it? A. Oh, no, no. It is only 20, 25 percent.

Q. When you worked out of Kasser's office, were you working there as Kasser's employee or as a member of your firm, independent accountant? A. I worked as a member of the firm, but there was a period of time, about two years, when part of my fee, a small part of my fee, was paid to me as a salary from Technopulp.

Q. When you went out and did Kasser's tax returns, personal tax returns, did you do that as Kasser's employee or as a member of your firm? [40] A. As a member of my firm.

Q. The money that you received, was that for doing this Kasser work, was that shared with your partner? A. Of course. Yes.

Q. What about the salary that you received, was that shared with your partner? A. Yes.

Q. So it is fair to say that all moneys that you received in connection with Kasser or Kasser-related corporations you shared with your partner? A. That's correct.

Q. Do you remember Mr. Miller asked you whether you were served with two subpoenas, which are Exhibits 1 and 2? A. Yes.

Q. And you have those in front of you, is that correct? A. I have one of them in front of me.

Q. Those records that were produced in connection with the subpoena that specifically asked for the records in the three file cabinets—— A. Yes.

Q. —those you brought to the federal courthouse at your request by postal inspectors? A. Correct.

Q. And those cabinets were kept locked; isn't that [41] correct? A. That is correct.

Q. Didn't you have the only two sets of keys to those cabinets at the time you were subpoenaed? A. I had one set of keys.

Q. Did you have both sets? A. Oh, yes, I did have both sets.

Q. And it was only after you were subpoenaed that you gave up one set to Michael Kasser; isn't that correct? A. Well, let me recall.

Mike Kasser had a key to the office——

Q. Will you answer the question? I am sorry, I don't mean to interrupt you, but will you answer the specific question? A. I am trying to recall. I only had one set of keys with me that I had in my possession. The other set of keys to the file cabinets were kept in the office.

By the Court:

Q. So that you had the custody or control of both sets of keys; isn't that right? A. No, that is not exactly right, your Honor, because——

Q. Which office were they kept in? A. 248 Lorraine.

Q. Whose office was that? [42] A. That was really at Kasser's office.

Q. It was really at Kasser's office, but it was a place where you did your work; isn't that right? A. Some of my work, yes.

Q. Was it in the drawer of the desk that you used? A. Right.

Q. So that you had the custody or control of both sets of keys until after you were subpoenaed; isn't that right? A. That's correct, but Mike Kasser had a key to the——

Q. Had a key to the office. A. Had a key to the office and a key to the desk.

Q. Who put the keys in the desk? A. I did.

The Court: Go ahead.

By Mr. Schreiber:

Q. This office at 248 Lorraine Avenue, that was in Joel Mallin's name; isn't that correct? A. That's correct.

Q. Let us just for the moment call that the Mallin office. The lease was in his name, is that correct? A. Correct.

Q. And he bought the furniture, he paid for the furniture; isn't that right? [43] A. Right.

Q. And he paid for the phone service, isn't that right? A. Correct.

Q. To your knowledge, has he ever been there? A. Not to my knowledge.

Q. Did he ever have a key to the office? A. Not to my knowledge.

Q. Did he ever have a key to the file cabinets? A. Not to my knowledge.

Q. Did Mr. Mallin ever reach you at that office, phone you there from time to time? A. Not that I recall. It's possible, but I don't recall.

Q. Are you saying that it is your best memory that you don't remember Mr. Mallin ever calling you there? A. I don't.

Q. Or are you saying that it did not happen, to the best of your memory? A. To the best of my memory it didn't happen.

Q. Are you familiar with the project in Manitoba? A. Yes.

Q. Are you familiar with the size of that project and its purpose? A. Generally, yes.

[44] Q. Are you familiar with the fact that it was an industrial project or complex to harvest timber, to make pulp, paper? A. That's correct.

Q. Are you familiar with the corporations that are connected with that project? A. Yes.

Q. Are you familiar with a corporation called Churchill Forest Industries? A. Yes.

Q. What was Churchill Forest Industries? A. Churchill Forest Industries was to be the owner of—was the owner of a pulp mill and a small saw mill, I believe.

Q. Do you know who owns CFI, or Churchill Forest Industries?

MR. MILLER: I object, your Honor. It seems to me we are going beyond the scope of the direct examination. If he

wants to get into the project up in Canada, it is a hundred-million-dollar project. There are many corporations, and we are getting into a vast area, which I don't think really has any relevance here, except the fact that a massive investigation was undertaken in Canada, which in effect caused Dr. Kasser to have the records placed in 248 North Lorraine. [45] To me that is the only relevancy.

THE COURT: Is it a relevant inquiry on credibility?

MR. MILLER: I don't see how it would be, your Honor, as to whether he knows who owns a particular company.

THE COURT: It may bear on credibility. Go ahead.

Q. Do you know who owns Churchill Forest Industries? Will you answer that yes or no, do you know? A. Yes.

Q. Is Churchill Forest Industries also known as CFI? A. Yes.

Q. Who owns CFI, to your knowledge? A. Michael Kasser.

Q. Presently? A. Yes.

Q. And did Alexander Kasser own it at any time?

MR. MILLER: I object again, your Honor. I think we are going far afield, beyond the direct examination.

THE COURT: Overruled.

Q. Did Alexander Kasser ever own it at any time? A. Yes.

Q. When did he cease owning it? Let me withdraw that question and ask you this question: Did Michael Kasser, Alexander Kasser's son, take over ownership of CFI after Mr. [46] Kasser, Alexander Kasser, left the United States in July or August 1971? A. Yes, I believe it was shortly after that.

Q. Are you familiar with a company called River Saw Mills? A. Yes.

Q. Is that connected with the project? A. Yes.

Q. Do you know who owned River Saw Mills? A. River Saw Mills was owned by Blue Construction Company.

Q. Do you know who owned Blue Construction Company? A. Yes.

Q. Who owned Blue Construction Company? A. James Brown.

Q. Did Alexander Kasser have any ownership or control over Blue Construction? A. No, but he had an option.

Q. Isn't it a fact that you had a power of attorney over Blue Construction's checks and you could sign—in fact, did sign—most all of Blue Construction's checks? A. Not most all, but I signed some.

Q. Signed substantial numbers of those checks, didn't you? [47] A. I don't know the exact count, but I signed checks for Blue Construction.

Q. Wasn't it in fact true that your power of attorney over Blue Construction's bank account was a way for Alexander Kasser to exercise control over both Blue Construction and River Saw Mills?

MR. MILLER: I object again, your Honor. I don't think this has any relevancy either to credibility or to the issues of this hearing.

THE COURT: What is the purpose of the inquiry?

MR. SCHREIBER: The purpose is not only credibility, as your Honor pointed out, but this is going to the background of the seizure of Canequip's records, which led to Mr. Kasser's departure from this country, which therefore goes to the reason why this office was set up and what purpose the office had.

THE COURT: We can take it from the statements that have been made heretofore that the whole purpose of putting those records there was to put them out of the reach of persons interested in seizing them or acquiring them. How much more do you need than that?

MR. SCHREIBER: Not much more. If your Honor would bear with me for——

THE COURT: Why do you need the details?

[48] MR. SCHREIBER: I won't go into the details much more.

BY THE COURT:

Q. Are there creditors involved here from whom you are trying to keep these records or Kasser was trying to keep

these records? Was that the purpose? A. The purpose was to keep them from the Canadians.

Q. When you say Canadians, you mean Canadian Government? A. Yes.

Q. And the Canadian Government was seeking the records—what? In its official function? A. Your Honor, I don't know what their function was, really.

Q. At all events, it was the Canadian Government that was looking for the records, and the whole purpose of putting these records and this business of taking them from your office and putting them in Michael Kasser's office and taking them from Michael Kasser's office or apartment and putting them up there in Montclair, the idea was to keep them from falling into the hands of the Canadians; is that right? A. That's correct.

By Mr. Schreiber:

Q. And the Canadians that you are talking about are [49] the Royal Canadian Mounted Police; isn't that correct? A. I am not confining it. It's just Kasser gave me instructions he wants to keep them from being seized by the Canadians.

Q. You knew, did you not, that it was the Royal Canadian Mounted Police who seized the records of Canequip up in Montreal; you knew that, didn't you? A. I was told people from the Government representing the Manitoba government—what their official designation was, I don't know.

Q. Are you saying that you don't know that it was the Mounties who went into Canequip and took the records? Is that what you are saying? A. I don't know that it was ever described to me as Mounties. Possibly.

By the Court:

Q. Who did you understand went to get the records? Was it the President of Canada or was it the Chief Chamberlain? Who went for the records as far as your information was concerned? A. Persons—you mean up in Canada?

Q. Yes. A. Persons representing the Manitoba government. I am not trying to be fussy. If it was the Mounties, it was the [50] Mounties. That word wasn't used, that I recall.

THE COURT: Some official went for the records. That is good enough.

BY MR. SCHREIBER:

Q. What about the police?

THE COURT: That does not make any difference, whether it is an executive arm or some other administrative function.

Q. Are you familiar with a company called Bertram Verkauff? A. Yes.

Q. Was that connected with the project? A. They were one of the major contractors.

Q. Did Kasser have any connection with them?

MR. MILLER: If the Court please, I again object.

THE COURT: It seems to me that we have covered the background for the reason for the secreting of the files, and the details if there are any to be obtained are not part of the purpose of this proceeding. If you have not purposes along those lines, for the grand jury, this is not the place to inquire into them.

MR. SCHREIBER: Very well, your Honor.

Q. Are you familiar with Canequip Export Ltd.? A. Yes. [51] Q. And that was located in Montreal, wasn't it? A. I think so.

Q. It was the records of Canequip Export Ltd. that were seized, is that correct? A. Yes.

Q. You were aware, are you not, that those records were seized pursuant to a search warrant; isn't that correct? Did you know that? A. I think so. I think there was a warrant I heard of some kind.

Q. There were other Canequip records in an individual, were there, in Alfred Bissonnette's office, that were also seized pursuant to warrant? Isn't that correct? A. I was told they were seized.

Q. Are you saying that you heard that there was a warrant for the records seized from Canequip's offices, but you did not know that there was a warrant used to seize the records from Bissonnette's office? A. I honestly don't recall. The important thing that I heard was that they were seized. Probably was pursuant to warrant. I didn't make any significance of it at the time.

Q. In your affidavit didn't you say that you were informed that agents in Manitoba had rifled the files of a lawyer representing Canequip? That was not a true statement, [52] was it?

MR. MILLER: If the Court please, I wonder if a copy of the affidavit might be placed in front of the witness so he can see whether or not it states that.

Q. Did you state that, Mr. Horowitz, to the best of your recollection? A. I was informed.

BY THE COURT:

Q. That word "rifled" is not your word, is it, Mr. Horowitz? That was one that appeared in the affidavit which you signed. Isn't that the way it got there? A. Probably. I don't recall.

Q. Did you dictate this affidavit yourself, or did you furnish somebody some basic information and then come and sign an affidavit that somebody else prepared? A. I furnished basic information, but every word in this affidavit was read by me before I signed it.

Q. In other words, you want me to understand that you were informed that files were rifled? A. Yes. I was told that——

Q. What does the word "rifled" mean to you? Is that the same as stolen? A. No. It means somebody goes through and picks out documents. That is what it would mean to me. [53] Q. In other words, you used "rifled" in the sense that items were extracted from the files lawfully? Is that the sense in which rifled was used in this affidavit? A. I didn't really go into the semantics of it. I was told that—

Q. That is a harsh word, "rifled." That means stolen, ordinarily. But I suppose somebody could also visualize it, if they read it too quickly, as being that somebody went through the files and extracted what he was looking for. A. I didn't intend the connotation "stole."

Q. That was what Mr. Schreiber was asking you. A. Oh, I am sorry, I misunderstood.

By Mr. Schreiber:

Q. Do you remember Mr. Miller asked you how you learned that the records had been seized? A. Correct.

Q. And you said that Mrs. Tannean had called you, is that correct? A. Yes. I think it was a Mrs. Tannean. Somebody called me. I assume it was Mrs. Tannean.

Q. Where was Mrs. Tannean calling from when she called you? Was she calling from Canada? A. Yes.

[54] Q. Do you recall testifying in the grand jury about how you learned of that seizure? A. I recall it being mentioned.

Q. Were you candid when you were asked that question? A. Pardon?

Q. I say, were you candid before the grand jury when you were asked that question?

Mr. Hundley: Your Honor, I object.

The Court: Sustained.

Q. Do you recall being asked these questions and giving these answers to the grand jury——

Mr. Hundley: If your Honor please, as his counsel I state he is now attempting to impeach him from the grand jury testimony.

The Court: I suppose you could impeach him from anything that he has ever said or written before, but what I am wondering about, Mr. Schreiber, is: What has this all got to do with whether these were records that are subject to your subpoena?

Mr. Schreiber: I think that part of what is at issue here is Mr. Horowitz's credibility.

THE COURT: I know, but this is not the place for cross on the grand jury testimony.

MR. SCHREIBER: Very well.

[55] Q. Mr. Horowitz, were you aware that the Canadians had taken over the project in Manitoba on or about January 7, 1971? A. Yes.

Q. Thereafter did you purchase at Kasser's instructions approximately one million dollars in municipal bonds? A. That's correct.

Q. Were those bearer bonds?

MR. MILLER: I object, your Honor.

THE COURT: Sustained.

MR. MILLER: Again we are going too far afield.

Q. You indicated in response to questioning from Mr. Miller that after you learned that the Canadians had seized Canequip's records that you had a number of conversations with Alexander Kasser; is that correct? One was by phone with Michael Kasser, is that correct? A. Well, Michael Kasser and I were both on the phone talking to his father Alexander.

THE COURT: That is what he is asking you. He is asking you whether there was a three-way conversation.

THE WITNESS: Yes.

Q. And then you had other conversations in person with him, isn't that correct, with Mr. Kasser? A. Yes.

[56] Q. Did he return to this country shortly after that seizure? A. Yes, I think so.

Q. When he came back from the United States, didn't he in fact transfer his home to his son Michael Kasser? A. I don't think he transferred his home to his son. I think he transferred it to his wife.

Q. Did his wife then transfer it to his son Michael Kasser? A. I think so.

Q. Then his son ended up owning it, is that correct, or at least it was in his name? A. His son ended up owning it.

Q. Pardon? A. Yes, Michael Kasser ended up owning it.

Q. Shortly after that seizure up in Canada, Mr. Kasser

resigned his position with Technopulp, didn't he? A. It was during that same year.

Q. It was shortly after the seizure in Canada, wasn't it? A. The seizure, you said, was January 7.

Q. No, I mean the seizure—excuse me—January 14 is what I am talking about, seizure of Canequip's records. A. Oh. I don't know the exact date that Alexander [57] resigned, but it was sometime during 1971.

Q. Was it during the summer of 1971, July or August 1971, that Alexander resigned—— A. It could have been.

Q. —from Technopulp? A. It could have been, but I don't know the exact date.

Q. Did you ever have any conversations with Mr. Kasser when he came back following the seizure at Canequip relating to the subject of extradition? A. No.

Q. Did Mr. Kasser ever mention to you that he was concerned about his possibly being extradited from the United States and prosecuted in Canada for fraud?

MR. MILLER: I object, your Honor.

THE COURT: Sustained.

MR. MILLER: I don't see that this has any relevance.

MR. SCHREIBER: Your Honor, this goes to flight, and I think it is relevant to something——

THE COURT: Flight has nothing at all to do with the issue before me. The question is whether I should quash or not quash a subpoena.

MR. SCHREIBER: The issue as to whether Mr. [58] Horowitz had possession or Alexander Kasser had possession.

THE COURT: Nothing at all to do with the problem of flight.

MR. SCHREIBER: I think it is relevant that Kasser has fled.

THE COURT: We can assume that Mr. Kasser made himself scarce. What has that got to do with the right to the records?

MR. SCHREIBER: The issue is not technical ownership but possession primarily. I think it is relevant to that issue as to whether he is gone from the United States for good.

THE COURT: That is not necessarily abandonment of possession, by leaving the country. I don't think I need to say any more about it.

BY THE COURT:

Q. Let me ask you this question, which I would like to get the answer to, Mr. Horowitz. In this affidavit of Joel Mallin, sworn to the 16th of January, 1973, he says that Alexander Kasser communicated with him that he wanted an office where Mr. Horowitz, a certified public accountant, could go for information to prepare tax returns. Does that accord with your understanding? A. I don't think it was limited to that.

[59] Q. Was that a purpose? A. That was one of the purposes.

Q. And he says that he does not now and never has had a key to the office No. 4 and has never been in the office, the office being leased as an accommodation for a Dr. Kasser. Does that agree with what you have to say? A. Yes.

Q. In other words, it was a coverup for Dr. Kasser? A. It was a place for him to conceal records, yes.

Q. So you and Mr. Mallin both agree that you would facilitate a concealment of records for Mr. Kasser; is that it? A. Well, I had followed Mr. Kasser's instructions.

Q. You knew that those records were desired by a governmental authority? A. He indicated to me that he didn't want them to be seized by a governmental—by the Canadians.

Q. As a certified public accountant under principles of proper accounting ethics, is it part of your function to conceal records from governmental authorities and act as a storagehouse for a client? A. Well, it's hard for me to answer that question. The records were his property, and if he felt concerned about concealing them from what he felt might be an unlawful [60] seizure, they had seized bank accounts in New Jersey of one of his companies and which

was later vacated, the attachment was vacated, I felt he was trying to protect his interests.

Q. When you say it was an unlawful seizure, you are referring to a seizure or an attempted seizure by the Government; isn't that right? A. Well, he felt that he didn't know how but that it was possible that the Canadians somehow would manage to get ahold of his records.

Q. Did you understand that they wanted to get hold of his records in connection with a criminal inquiry? A. I don't think at that time that I was aware of any criminal inquiry.

Q. Did you think it was for the purposes of concealing them from civil liability or didn't you think about it at all? A. I really didn't think about it at all. That's the best answer.

Q. In other words, you were getting 25 percent of your income from Mr. Kasser, and he said conceal the records and you said OK. A. No, he said, "I want you to keep them for safekeeping there and"——

Q. Well, that is a gloss on what happened, isn't it? [61] But this was an important client, he was telling you to conceal records which you knew a governmental authority wanted for governmental purposes, and you succumbed? A. No, I didn't succumb, your Honor, if I may say so. It had nothing to do with——

Q. It had nothing to do with you? A. Nothing to do with me. He felt that his—he felt outraged at the seizure in Canada, to start with.

Q. He could have satisfied his outrage by putting these records in the storage warehouse rather than with a trusted accountant, couldn't he? A. I suppose he could, but——

Q. Do you customarily store records for concealment purposes, conceal records from a foreign government? A. No, sir. And they could have been from foreign creditors too. I felt they were his property, and if he wanted to protect them he was entitled to protect them.

Q. In other words, you were willing to lend yourself to whatever the purposes were, without thinking about it too much; isn't that what it really comes down to? A. I didn't see anything wrong with it.

Q. You didn't see anything wrong with a professional man secreting records known to be the target of a foreign government's effort to get at them? You did not think that [62] that was wrong? A. No. He explained to me that this was an unlawful takeover and that——

Q. Did you accept his explanation that it was unlawful? A. That's the way he felt about it.

Q. But how did you feel about it? A. I don't think I had any legal opinions on the matter.

Q. What did you think as to the lawfulness of the seizure or the attempt to get at the records? A. Well, there are a lot of people who felt it was unlawful.

Q. What did you as a professional man with your background and knowledge and understanding of what happens in matters of this kind believe? Did you believe that there was anything unlawful in the Manitoba Government's procedures, or didn't you think about that? A. It was told to me that it was unlawful.

Q. Yes, I know, but do you blindly accept anything that is told to you? A. I am not an attorney, and I had no opinion about it.

Q. As a certified public accountant, you have certain standards, don't you? [63] A. Yes.

Q. And one of those standards is to inquire into a rather bold statement that a government proceeds illegally. Wouldn't you do that? A. I didn't think of it that way.

Q. You didn't think about it. A. No.

THE COURT: Is there anything else?

MR. SCHREIBER: Yes, sir.

THE COURT: Directly pertinent? I don't want to get off on this business about Manitoba.

MR. SCHREIBER: Very well, your Honor.

By Mr. Schreiber:

Q. Mr. Horowitz, you indicated that the purpose was to conceal these records; isn't that correct? A. That's correct.

Q. It was also a purpose, wasn't it, for you to have a place to work on these records; isn't that correct?

The Court: We have covered that. He has admitted that that is one of the purposes. It is a strange circumstance where a certified public accountant licensed by the state and a gentleman that I don't know who he was licensed by, whether New Jersey or New York, a professional attorney, participate in a matter of this kind. That may not bear [64] directly on the question of the validity and the scope of the subpoena, but it is a most extraordinary situation.

Mr. Miller: If the Court please, would it be appropriate for me to address myself to that point.

The Court: Yes. Are you through?

Mr. Schreiber: No, I have just a few more questions.

The Court: All right. Make sure that they relate to the subpoena and the records. I am not interested in pursuing the Manitoba Government's chestnuts.

By Mr. Schreiber:

Q. You indicated, Mr. Horowitz, that after that seizure by the Canadians of the Canequip's records you yourself took records from your office and placed them in the Mallin office; is that correct? A. That's correct.

Q. Could you indicate on Government's Exhibit 3 what records you took from your office and placed in the Mallin office? Can I give you a pen? Could you just do it with a check, if you would.

The Court: Here is a red pen, Mr. Horowitz. Just check it, or circle the number.

Mr. Miller: Would it be appropriate to move Exhibit 3 into evidence at this time?

The Court: I will consider it received in evidence.

[65] (Government's Exhibit 3 received in evidence.)

A. I don't recall exactly what records, but I know at that time there were records in my office which I felt were needed, not too many records, were needed information to be shown to the agent from the Internal Revenue Service. And I took them from my office and brought them over to 248 Lorraine Avenue.

MR. HUNDLEY: Judge, I think I can shorten it. It is not in the part that he inventoried; it is in the part that I inventoried.

THE COURT: All right. When you have time and can calmly sit down and do so, just put a red mark next to any of the records, drafts, pro forma statements, worksheets, copies of returns, original or duplicates or pencil copies, that originated from your office and found their way into these files that are in the United States Attorney's office. After you have circled those and gone over them at your leisure, hand them to your attorney and he will supply the Government with that information.

BY MR. SCHREIBER:

Q. Mr. Horowitz, most of the records in those three file cabinets are really corporate records, aren't they? I am not talking about specific documents, but quantity. Most of those are corporate records, aren't they?

[66] MR. MILLER: I object to the form of the question.

BY THE COURT:

Q. Were the records which you inventoried there with the letter "S" principally of a corporate character, and relating to the corporations? A. I wouldn't say principally.

Q. Then you just put a "C" next to that list when you get home for the records, the folders, that you say were corporate in character, as distinguished from something private and personal like a will or a love letter or something of that kind.

By Mr. Schreiber:

Q. The records in that office, in those file cabinets, also included records that were not Alexander Kasser's or Elizabeth Kasser's; isn't that correct? A. That's correct.

Q. They are records of other people in that office, isn't that correct? A. That's right, to some extent.

By the Court:

Q. When you go through that list, I would be appreciative if you would just put the letter "O" next to those items that belong to others, relate to others. A. May I write this down?

Q. Your lawyer will remember these. The categories [67] are very simple: The categories so far, "C" for the corporations and "O" for others.

By Mr. Schreiber:

Q. There were numerous records, including personal records, that you consulted, isn't that correct, in preparing Kasser's tax returns—for example, the dates of trips. You might look at his diary, isn't that right? A. I might. Usually there was a summary made for me other than a diary.

Q. Did you ever consult his diary for any purpose to determine whether deductions ought to be taken or ought not to be taken? A. I may have.

Q. Are the diaries included in that material? A. I think there are diaries, not in the part I inventoried but I remember that there were diaries.

The Court: All right.

Mr. Miller: There are a lot of diaries.

The Court: Put a "D" next to diaries.

Q. There are some records in there that relate to correspondence between attorneys and Mr. Kasser, isn't that correct? A. That's right.

Q. Did you look at that correspondence at all? [68] A. No.

Q. And you did not look at it even a little bit to see what it was? A. If the file was labeled "Legal," I had no occa-

sion to look at it. There may have been times when Mr. Kasser showed me something, a letter from his lawyer, or unless the letter from the lawyer was addressed to me I didn't get to read it directly.

Q. When Kasser gave you files that had "Legal" on it or when you moved files from Technopulp's office to the Mallin office, and it said, let us say, from Joel Mallin file, or Roberts & Holland file, both of whom were lawyers for Mr. Kasser; isn't that correct A. Yes.

Q. Did you look at those files, the contents of those files, at all? A. I may have thumbed through them.

Q. You mean you may have glanced at them, is that right? A. That's right.

Q. And seen what they said, is that correct? A. Right.

Q. Would you say that that is true with respect to most of the materials in these files that you looked over [69] from time to time? A. From time to time?

Q. Did you look at the materials in the file cabinets, aside from the financial stuff, and either glance over it or study it or read the contents of it? A. Only if there was some specific reason for me to search for something or Kasser had told me that there was a legal opinion on it, and that was rare. Usually they—I would get a letter directly or there was a memorandum made on it.

Q. Did you prepare the tax returns for Kasser's children? A. Yes.

Q. Were those contained in the file cabinets too? A. I didn't inventory the whole thing, but I believe there might have been some of them maybe on there.

Mr. Hundley: There were, your Honor.

Q. And you indicated before, in response to the Court's questioning or Mr. Miller's questioning, I am not sure, that you purchased certificates of deposit and banker's acceptances; is that correct? A. That's right.

Q. Can you verbalize your response? A. Yes.

[70] Q. And did you prepare lists of those certificates of deposit? A. Yes. I prepared current lists from time to time.

Q. Those lists of those certificates of deposit are also in the file cabinets, aren't they? A. They could be. If they are on the inventory, they are.

Q. Look at page 7 of the inventory.

MR. SCHREIBER: Your Honor, while the witness is doing this, I am going over these items because these items were not supplied to the Government. They were held back pursuant to resolution of these——

THE COURT: I cannot see any basis for holding back a list that this witness prepared on transactions that he negotiated.

MR. HUNDLEY: I might also point out: He did not prepare this part of the inventory.

THE COURT: What is that?

MR. HUNDLEY: He did not prepare this part of the inventory.

THE COURT: All right. But I am talking about the document itself. It seems to me that any investment work that this man did and a list setting forth what it was, which he then transported and put in North Montclair, is [71] subject to the subpoena.

MR. MILLER: If the Court please, approximately one and two-thirds cabinets full of records—I believe that is the amount—have already been turned over to Mr. Schreiber.

THE COURT: He is complaining about what you did not turn over, not what you did.

MR. MILLER: I recognize that, sir. What we were trying to do was to go through, because the files are sometimes labeled "Corporate" but will contain personal things, and that is the reason that some records which appear to be corporate were not turned over. I just wanted to make that clear for the record.

THE COURT: That means that you can expect some more material, Mr. Schreiber. Anything else?

MR. SCHREIBER: Yes, your Honor, I would like to go through specific tax-related items which have not been

turned over. But I won't if it is your Honor's ruling that tax-related——

THE COURT: Tax-related items that this man functioned on seem to me to come right in the Couch case.

MR. MILLER: If the Court please, will I have a chance to be heard on that?

THE COURT: Yes. I assume that you will bear in [72] mind that the Supreme Court has also said something about it, so you had better talk against them, not me.

Q. Did you prepare reports or documents for the Commerce Department for Mr. Kasser? A. Yes.

Q. Did you retain a copy of those reports or papers yourself? A. Well, a copy was retained.

Q. Are those reports in the Mallin office, were they in the file cabinets? A. They could be. As I said, I didn't prepare most of the inventory.

Q. Did you prepare those Commerce Department reports? A. Yes.

Q. Who is a man by the name of Kereckes? A. He is an engineer that used to work for Technopulp. He died a few years ago.

Q. At page 13 of that inventory, the first cabinet, we counted up, it is No. 90, there is a list of Kasser tax returns for the years 1967 through 1970. Did you prepare those returns? A. Yes, I prepared those returns.

Q. Are those the penciled returns that you retained, the penciled copies? [73] A. I am not sure which copies they are, whether they are the client's copy or a penciled copy. I would have to see. I didn't inventory this.

Q. You were the author of them anyway? A. That's correct.

Q. On the next page, No. 9, it says that there is a file containing Stanley Mullette's personal papers; is that correct? A. That's correct. I didn't label that. It's correct, your reference is correct. I don't know what it contains. I didn't inventory that.

THE COURT: Mr. Schreiber, it seems to me that these inquiries are best addressed as between counsel. Mr. Miller has told you that he has not had a chance to complete the delivery process. I think that that ought to come first, and it is perfectly obvious what the direction is of the ruling. And if you run into a snag on that account, then I can hear it. But there is no use in just taxing this witness' strength by repeating all of these details.

MR. SCHREIBER: Very well, your Honor.

THE COURT: Any further questions, Mr. Miller, of this witness?

REDIRECT EXAMINATION

BY MR. MILLER:

[74] Q. At the time you placed these records at 248 North Lorraine, to your knowledge was there any outstanding Government process seeking to obtain the records? A. I am sorry, I didn't get the last part of the question.

Q. At the time you placed the records at 248 North Lorraine, did you know if there was any outstanding Government process or subpoenas or warrants to obtain these records? A. No.

BY THE COURT:

Q. Did you anticipate that there would be one? A. Only what Dr. Kasser told me, that there was a possibility. I didn't anticipate it.

Q. The whole purpose was to get there a step ahead of the warrant, wasn't it? Otherwise there would be no point to concealing the records up in Montclair; they were being put away before the warrant was served. Isn't that what was happening? A. Well, they were put away, as I said before, your Honor, to keep them from the Canadians.

THE COURT: All right. The situation is clear.

BY MR. MILLER:

Q. Who is Alfred Bissonnette, if you know? [75] A. He is an attorney up in Canada.

Q. And it was his records that were seized? A. That is what I was told.

MR. MILLER: No further questions, your Honor.

THE COURT: All right. Thank you very much.

MR. SCHREIBER: Your Honor, I would like to correct the record on one point. I have one question if your Honor would bear with me.

THE COURT: What is that?

RECROSS EXAMINATION

BY MR. SCHREIBER:

Q. You indicated they were Albert Bisonnette's records that were seized or Canequip's records that were in his possession? A. I was told that—my information was that records had been taken from Bissonnette's office.

Q. But those were Canequip's records that were in his office, isn't that correct? A. I don't know.

MR. SCHREIBER: I have no further questions, Your Honor.

THE COURT: Thank you. Step down. I want to take care of the jury.

MR. SCHREIBER: Would your Honor prefer to continue [76] it tomorrow morning?

THE COURT: I have no preference in the matter. My strength will hold out. It is just a question of yours, not mine.

MR. HUNDLEY: Let us finish. We came all the way up from Washington.

MR. SCHREIBER: I have an appointment at 5:30.

MR. HUNDLEY: We can carry on.

(Recess)

THE COURT: Mr. Schreiber, do you want to go on?

MR. SCHREIBER: I would like to break; the other fellows want to continue.

MR. MILLER: If the Court please, in the interest of expedition, Mr. Joel Mallin is here and prepared to testify. I suggested, in view of the lateness of the hour, if it is

satisfactory to the Court, that Mr. Schreiber and I stipulate that if called to testify he would testify as to the facts stated in his affidavit.

THE COURT: The affidavit can be taken as his direct testimony. Is there any cross-examination that you want to conduct, Mr. Schreiber?

MR. SCHREIBER: There is some brief cross-examination.

THE COURT: Brief?

MR. SCHREIBER: Brief.

[77] THE COURT: All right. Put Mr. Mallin on the witness stand.

JOEL MALLIN, residing at 186 Forest Hill Road, West Orange, New Jersey, called as a witness by the Government, being first duly sworn, testified as follows:

CROSS EXAMINATION

BY MR. SCHREIBER:

Q. Mr. Mallin, this is going to be cross-examination. A. Yes.

Q. You understand that your affidavit in this matter is taken as your direct testimony. You are familiar with the office in your name at 248 Lorraine Avenue, is that correct? A. I am familiar in the fact I know it exists.

Q. You signed the lease for it, is that correct? A. Yes, I did.

Q. And you paid for the furniture, is that correct? A. That is correct.

Q. And the phone service? A. Yes, sir, and the rent.

Q. And the rent? A. Yes.

Q. Were you ever at that office? A. No, I was not.

[78] Q. Do you know whether Mr. Horowitz was ever at that office? A. Yes. Mr. Horowitz told me that he has been at the office; once in the 12- or 18-month period that we have had the office I called him at that office.

Q. Do you recall ever saying to anyone that you used to call Mr. Horowitz at that office from time to time between July or August 1971 and August of 1972?

MR. MILLER: May I inquire to whom and when?

THE COURT: Yes, you can do that on redirect examination. Go ahead, answer the question, please. A. My only clear memory is talking to him one particular time.

Q. Did you ever tell anybody, any government official, and I would include myself in that connection, did you tell any government official that you used to call Mr. Horowitz there from time to time if you could not reach him at Technopulp's office? A. I don't remember. I don't think so.

BY THE COURT:

Q. Is it the fact that you did call him from time to time when you could not reach him at the other place? A. No. I only called him once.

BY MR. SCHREIBER:

Q. Did you have a conversation with Mr. Horowitz [79] outside in the hall of this courtroom, and did you discuss that with him, the question that he had been asked that question? A. Absolutely not.

Q. On his cross-examination? A. No, sir.

Q. In your conversation with Mr. Kasser, did he indicate to you that he wanted an office not only to conceal records of Technopulp but he wanted an office that Mr. Horowitz could work in and prepare tax returns? A. Well, Mr. Kasser first asked me to take the office. This was at the time when the Canadian, a Manitoban government had expropriated the records——

THE COURT: Come to the point, Mr. Mallin.

A. Well, I am trying to, your Honor.

THE COURT: Just answer the question directly. It is a late hour and I don't want a general tour of this matter.

A. He wanted an office—I don't like the term "conceal," your Honor. I don't think it is proper. He wanted an office where he would have records that would be safe from an illegal seizure by the Canadian Government, and an office where Mr. Horowitz would have access so that he could prepare tax returns from these records, yes.

[80] Q. Did Mr. Horowitz ever tell you from time to time that he had worked in that office and actually prepared tax returns or the material necessary for tax returns? A. Yes. It was my understanding that he had indicated to me from time to time that he would go to that office and use the material there.

Q. And use the materials in the files, is that correct? A. I don't know whether he used the materials in the files, but he worked there.

Q. You said he used materials there. A. Yes. I don't know where the materials came from.

Q. Were you reimbursed for all the expenses that you incurred for this office that was in your name? A. Through October of 1972, yes. I have not sent a bill for the recent rental payments, but I assume that I will be reimbursed for those too, as I have in the past.

Q. Did you receive checks or a check, checks for that reimbursement? A. Yes, I did.

Q. Were those checks signed by Simon Horowitz as power of attorney for Alexander Kasser, to the best of your memory? A. I have no idea. No, I am sorry. One check came from Mr. Kasser. I do not know who it was signed from. The [81] second check came from Stephen Mochary, Mr. Kasser's son-in-law.

Q. But you are saying that one check you are unsure of but another check for reimbursement of expenses came from Mr. Kasser's son-in-law, is that correct, and not from Mr. Kasser directly; is that what you are saying? A. The bill was made to Mr. Kasser directly. The check I received, as I remember, was from Stephen Mochary on behalf of Mr. Kasser.

MR. SCHREIBER: I have no further questions.

THE COURT: Anything else, Mr. Miller?

MR. MILLER: No questions, your Honor.

BY THE COURT:

Q. Are you a member of the bar of the State of New York? A. Yes, I am, your Honor.

Q. Are you a member of the bar of the State of New Jersey? A. No, I am not, your Honor.

THE COURT: Step down.

(Witness excused)

THE COURT: Does that submit the matter now?

MR. SCHREIBER: Yes, your Honor, just except——

THE COURT: Then what I think you should do is to [82] go over the remainder of the files with Mr. Miller and find out where the areas of disagreement are. He can in the meantime make delivery to you of such materials as he believes you should have, and it may be necessary for me to make a physical examination of the balance if you cannot get to an agreement. But when you tell me that you have arrived at an impasse, I will discuss the next step. We have the testimony now. The picture is quite clear. Now the question of the scope of the subpoena is one that has to be dealt with. Very obviously, as was indicated at the last time, the corporate records are to be turned over, the non-Kasser records are to be turned over, the records that were moved to Loraine from Horowitz and Ullmann and originated there or were utilized there and were then deposited in this location, along with other records, clearly belong under the Couch doctrine to the category of materials to be turned over, and the balance of the materials will have to be considered on a piece by piece basis.

MR. SCHREIBER: What about the tax records, tax forms?

THE COURT: I am talking about the things that were prepared or utilized for tax purposes, and I have already told you that that material, it seems to me, is directly within the language of what the Supreme Court said. There [83] is a lot of other material there that has been talked about, like personal and private correspondence and testamentary dispositions and things of that kind, that seem utterly remote to the purposes of the grand jury. Unless you gentlemen agree on what should not be turned over under the subpoena, I suppose I will have to look at it myself. So you

make a stab at trying to get agreement and whittle down the area of controversy as far as you can, and I will do the rest when we get to the controverted material.

MR. MILLER: If the Court please, I assure the Court that I will do my best to make sure that the controverted material is kept to an absolute minimum.

THE COURT: All right.

MR. MILLER: And I think my actions so far have proven it. I would ask the Court only to reserve rulings on the copies of the tax returns at this time and give me a chance to come back to the Court on that.

THE COURT: My present impression is that anything that was prepared by Mr. Horowitz or an item prepared by Mr. Horowitz's office or his staff is an item that cannot be fobbed off by placing them in this location. I will give you the opportunity to persuade me to the contrary, but that is my present impression.

MR. MILLER: Thank you, your Honor.

[83A] MR. SCHREIBER: In other words, if I understand your Honor, you are reserving——

THE COURT: In the same words, just as it is on there. Please don't keep trying to get a renegotiation of an understanding.

MR. SCHREIBER: No, I am just trying to understand.

THE COURT: It is all on the record. There comes a time when words should be accepted at their face value.

Gentlemen, good night.

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

No. ——

IN RE GRAND JURY SUBPOENA

Affidavit of Joel Mallin

JOEL MALLIN being first duly sworn, deposes and states as follows:

1. Affiant is a resident of New Jersey and an attorney licensed to practice law in the State of New York with offices at 110 East 59th Street, New York, New York 10022.

2. That from time to time over the past several years, affiant has represented Dr. and Mrs. Alexander Kasser as their attorney with respect to tax and other matters.

3. In approximately July or August 1971, affiant was contacted by Alexander Kasser who informed affiant that he was concerned over wholesale seizure of records by agents of the Manitoba government, which records might be necessary for possible litigation, and that he desired an office away from Technopulp and his home where records could be safely kept and where Mr. Horowitz, a certified public accountant whom affiant had known for several years, could go for information to prepare tax returns. Thereafter, on or about August 5, 1971, affiant signed a lease agreement for Room 4 of 248 Lorraine Avenue, Upper Montclair, New Jersey. It was affiant's understanding that records belonging to Alexander Kasser would be placed in that office and he would reimburse affiant for any expenses incurred with respect to that office.

4. Affiant has paid the monthly rent on the office and the monthly telephone bills. Affiant paid for furniture that was placed in Office No. 4 by check dated August 9, 1971 payable to Acro Office Furniture, Inc.

5. Affiant sent bills to Alexander Kasser for these expenses through October 1, 1972, and was reimbursed by him.

6. That affiant does not now and never has had a key to the said office No. 4, and in fact has never been in said office, this office being leased as an accommodation for Dr. Kasser.

7. Affiant is informed and verily believes that Simon Horowitz and Michael Kasser, son of Alexander Kasser, have the keys to the premises.

FURTHER affiant sayeth not.

/s/ JOEL MALLIN
Joel Mallin

Subscribed and sworn to before me this 11th day of January, 1973.

/s/ KATHERINE SEXTON
Notary Public

Katherine Sexton
Notary Public, State of New York, No. 31-0927730
Qualified in New York County
Commission Expires March 30, 1974.

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

73 M11 188

BEFORE: HON. MILTON POLLACK, District Judge

New York, New York.
April 9, 1973—4:40 p.m.

* * * * * * * * * *

[2] THE CLERK: In the matter of Simon Horowitz.

MR. SCHREIBER: Your Honor, there are substantial outstanding matters and material that have not yet been turned over.

A substantial portion has already been turned over, I don't want to mislead you, Judge Pollack, but there are a substantial number of outstanding items that relate to taxes and certain other corporate matters which have not been turned over, and at this time I would like to bring up additional argument to your Honor, for your Honor to consider, in connection with this office, and that is, I would like to suggest to your Honor that just as a taxpayer in a tax situation is bound by the form of a transaction, namely, although a transaction could be reconstituted to have no tax consequences, he is bound by the form of transaction that he originally conceived and I would suggest, your Honor, the same analogy ought to apply to this office: namely, Kasser set up this office in the name of another individual and allows his accountant to use it and therefore he ought to be bound by the form of the ownership that that office took, namely, that it isn't his office, wasn't in his name, the bills were paid by someone other than himself and he never had access directly to that office and therefore I would suggest to your Honor on that [3] analogy, Alexander Kasser does not have any right to have any of the materials put in that office, their production squashed by subpoena, and I might point out to the Court and would

point out in that connection Joe Mallin had also been subpoenaed to produce the contents of those three file cabinets which as your Honor knows from the hearing and the papers in this case were placed in that office, in an effort to conceal them from the Canadian authorities who would want to subpoena them, and as a secret place for Horowitz to work on various tax and other matters he had to do with Kasser.

THE COURT: Does that give you the right to examine Kasser's will or love letters?

MR. SCHREIBER: If they are not in his possession, I think that gives us the right if they are relevant.

I suggest, your Honor, they are not relevant which——

THE COURT: How do I decide whether they are relevant?

MR. SCHREIBER: You could modify the subpoena to that extent but the problem with doing that, your Honor, is that the purpose of this office establishes that the records that were thought by Kasser to be related to the project in Canada, were placed in that office, so that at [4] least prima facie——

THE COURT: How do we know that?

MR. SCHREIBER: Horowitz testified to that.

THE COURT: Horowitz didn't say all of the records that were put in there were related. He just said that related records were put in there, but superficially it seems to me that there is material about, of which there is no doubt, it has nothing at all to do with the grand jury's inquiry.

MR. SCHREIBER: I have no objection to those documents being returned and I would intend to return those as quickly as we could have access to look them over.

The problem is, the substantial numbers of documents are related to the inquiry. There are a few like the wills and old tax returns that may not be related which would obviously were intermingled and since all these records were put together, it is difficult to frame a subpoena that could isolate those out.

THE COURT: What does Kasser's Racquet Club invoice have anything to do with this?

MR. SCHREIBER: It may be he entertained Canadian firms and——

THE COURT: Invoices just tell you what they——

MR. SCHREIBER: I can't answer that question, [5] your Honor. The problem is, the information on which the subpoena was predicated was that records that related to the project in Canada were all put in an office that was in the custody, control and possession of Mallin and Horowitz and both individuals were subpoenaed to produce them on the presumption they are all relevant.

THE COURT: Let's get down to something here.

Mr. Horowitz was going to annotate a copy of the inventory. Did he do that?

MR. HUNDLEY: Yes, your Honor, up to the point that he compiled, your Honor.

THE COURT: Does that annotated inventory contain any items on it that the objectants decline to turn over to the Government?

MR. SCHREIBER: I have not been supplied with a copy of the inventory.

THE COURT: Isn't that where we start? I thought that was the way we left at the last hearing, an annotation was going to be made by Kasser which would be informative, and as between counsel where they couldn't be any reasonable controversy, the document would be dealt with accordingly.

I was to pass upon controversies rather than to resume the hearing as if there had been no hearing the last [6] time.

MR. HUNDLEY: If I might add, your Honor, Horowitz did do that, which I have here now.

Mr. Miller, who is Kasser's attorney, thinks that he can tell your Honor very shortly what the controverted items are.

THE COURT: All right.

MR. MILLER: If the Court please, after the hearing I went back, we went through the documents as to the Court's suggestion, and we turned over substantial documents.

I can annotate the files about which there is a controversy. I might just state to the Court the area which is covered by the things we have not turned over.

Before I get to that, I will say some of the files, if the Court please, are intermixed. They have some obvious corporate, some obvious personal—I am certainly willing to turn over the corporate that is in the file.

Mr. Schreiber felt it would be better not to at the time because he didn't want the file to be disturbed. I acquiesced, and I have those marked, which are part corporate and part personal.

We are willing to turn over the corporate. Aside from that, to my knowledge, we have turned over all [7] the corporate and all the records that belong to third parties, which leaves us with approximately eight categories.

First of all, we have personal diaries of Alexander Kasser, notations, most of which so far as I can tell, kept in his handwriting, and they go back, from recent years back.

We have copies of his will. I believe the executed copy of the will is there. There is an executed copy of a trust agreement. There are his stock certificates. There are deeds. And there are letters addressed to him and copies of letters which he had written which to me is personal correspondence.

Anything that appeared to be corporate, as I say, we have turned over.

There are copies of bank statements and cancelled checks. There are copies of patents which he has obtained.

There are copies of ledger sheets that were made up and an asset list, which show what he owns, where he has the certificates of deposits and that type of thing.

In other words, a listing of things he owns.

There are several files of legal correspondence, including bills which were submitted, which are itemized as to the work layers had done.

There are work sheets which obviously were [8] prepared by Mr. Horowitz in the process of making computa-

tions either for taxes or for filing reports with the Commerce Department or perhaps some other Government agency. And there are some Commerce Department copies of returns filed.

In addition there are tax returns going back several years for Mr. and Mrs. Kasser. Those are the areas that I have attempted to block out as a part of my position, that these are personal documents and are not available to be turned over under the grand jury subpoena.

The suggestion we can turn these records over, if the Court please, and he will look at them and turn them right back, that isn't what the privilege is all about, as I understand it.

The privilege is designed to insure that the documents will not be utilized to make a case against the individual.

Those basically, if the Court please, are what I consider to be the personal records.

I can further, if the Court desires me to, and address myself to the Couch case, pointing out how that case is distinguished from the testimony of Mr. Mallin and Mr. Horowitz and particularly when we examined, Mr. Schreiber has made statements that these records were concealed and [9] indeed they were.

If you go through the inventory, you will find these documents were placed for safekeeping. You don't give your accountant wills, tax certificates, patents owned, deeds, trust to your children and other valuable papers.

I submit, if the Court please, with those things blocked out, as I have done so, we have complied with the subpoena, other than the motion to be filed to quash.

I would point out, in the Couch case, there the Court made abundantly clear records were turned over to the accountant for several years going back to 1955, and he continuously maintained possession of those records in his office.

I think, if the Court please, it is perfectly apparent in this case that he worked in the offices of Technopulp, and when directed to, he turned over to Alexander Kasser all

the documents placed in that file and those documents were in fact the personal property of Mr. Kasser, and the fact that the office was rented in the name of Mallin or Horowitz had a key or Mike Kasser had a key, does not change the basic right of privacy established under the Fifth Amendment.

The Schwimmer case, the Guterma case, those cases were not changed by the Couch decision and I submit [10] if the Court please, those items I have suggested to you are in fact covered by the Fifth Amendment, and constructive possession is in Alexander Kasser and Mrs. Kasser and therefore those records need not and should not be turned over, and the motion to quash addressed to this part should be granted.

MR. SCHREIBER: Your Honor, if I may be heard, first of all, Mr. Miller's statement that all the corporate documents have been turned over is not accurate.

There are documents listed, called the—well, it is No. 26 on L-4. I'm sorry, your Honor, I lost my place—for example, 69, on page 69 of the inventories, Technopulp invoices, credit invoices, corporate.

The next page, middle cabinet, line 26, documents from Chet in abeyance, also corporate records, and I can go on to the following page, page 55, Technopulp, Inc. earnings. That is the page of the middle cabinet, your Honor.

THE COURT: Why are we doing this thing piecemeal? You haven't yet seen the list that Horowitz annotated. You are just flying blind on these points, aren't you?

MR. SCHREIBER: The problem——

THE COURT: Don't you want to see what they annotated? [11] MR. SCHREIBER: A lot of the things they have turned over, they have turned over of the first page. Horowitz only did a third and——

THE COURT: Have you seen what he did?

MR. SCHREIBER: No, your Honor.

THE COURT: Then what is the use of talking about it?

MR. SCHREIBER: There are substantial portions of the inventory which he didn't do.

THE COURT: How do you know what the answers are on what he did do?

MR. SCHREIBER: There is little dispute on what is corporate and not corporate. The dispute is on the portion of the inventory that Horowitz has not done, Judge Pollack. One of the key——

THE COURT: In other words, you accept his statement as to what he has done?

MR. SCHREIBER: As to what is corporate and not corporate, to a certain extent. There are portions as Mr. Miller has pointed out, where there are corporate documents or some so-called personal documents intermingled with corporate documents.

It is really going to come down to your Honor's [12] ruling on the Couch aspect of this case; namely, who has possession of these documents, and if your Honor rules on that, it won't be necessary for us to go over this piecemeal.

There are extensive documents which you can argue are personal, quasi or entirely corporate. It seems to me with all due respect the fundamental issue, as your Honor has framed it, is who has possession of these documents.

That is the issue at the hearing, and that issue still remains unresolved at the present time.

We can go over these things piecemeal but I suggest, your Honor, we are going to come back again and again and it is very difficult to conduct an investigation where the documents, some of the documents we are really interested in are being dribbled out to us and held back for ruling and I refer specifically to the tax documents.

At Mr. Miller's request, your Honor said we should hold up turning those over until he could be heard on that.

I suggest, your Honor, that those documents, tax documents prepared and filed with the Government, are not within any ambit of privacy and ought to be disclosed, turned over pursuant to the subpoena.

[13] THE COURT: It seems to me on the basis of the testimony that appeared before me, that Horowitz was not

a personal employee of Kasser but an independent contractor.

Furthermore, Kasser is not being asked to produce anything. Kasser divested himself of his possession of his records and Horowitz had an independent status and had for all practical purposes total control of the possession of the records.

As I understand the law, the criterion for Fifth Amendment immunity is not the ownership of the data but the physical or moral compulsion exerted and here there is no semblance of governmental compulsion against the person of Kasser.

It appears to me that the data which originated from Horowitz' office is clearly data that the government is entitled to have produced under its subpoena.

The area of corporate records is not in dispute. That is clearly due to the government under the subpoena.

The remaining area having to do with material that originated from Kasser is subject only to the extremes of relevancy to the inquiry.

Since the man in possession of the data was charged with conducting in part or in whole the financial and tax affairs of Kasser or the Kassers, it would seem appropriate [14] that all data in the possession, actual and constructive, of Horowitz, through this office that was taken as a blind by him in the name of the attorney, who never even had a key and never even showed up at the office, ought to be and is directed to be turned over to the government.

I will exclude, however, from the submission to the government data which relates strictly to the personal and private and non-commercial affairs of the Kassers, such as their wills and personal trusts, and personal letters and copies of patents.

The legal correspondence, if it ever had a privileged status, was surrendered to the possession of Horowitz and falls in the same category as other matter that should be turned over under the subpoena except, again, if that legal

correspondence deals with the strictly private and personal affairs of the Kassers.

To the extent that the personal diaries contain notations of a business character, those would be useful as a reference for the function of Horowitz, and probably were placed in his custody for such reference purposes, and if that probability be not the correct and sole reason, then in all events, the business record therein is reasonably related to the general subject matter of the grand jury's search. [15] Reference has been made to bank statements and cancelled checks and asset lists and ledger sheets, and Commerce Department forms and tax returns.

All these clearly are matters as to which the Kassers are not producing evidence against themselves because the evidence is not in their possession.

The order of this Court will be directed against the accountant Horowitz, and the attorney, Mallin, for enforcement of the subpoena, except to the extent that items have been excluded therefrom as indicated previously.

Should there be a dispute that remains after this ruling, and finding of fact, the Court will undertake an in camera examination of the disputed items, to see on which side of the personal, private, or business investment line the particular item falls.

An order may be submitted accordingly.

MR. MILLER: If the Court please, I wonder, in view of the fact that in the deposition given and related civil proceeding in New Jersey, the plaintiff testified that he was interrogated by the Royal Canadian Mounted Police in the U.S. Attorney's Office in the Southern District.

According to his sworn testimony he was asked questions during the course of this interrogation by the Royal Canadian Mounted Police by somebody from the U.S. [16] Attorney's office. I would——

THE COURT: Was the plaintiff either Horowitz or Mallin?

MR. MILLER: No, sir, he was in an independent lawsuit against Kasser arising out of the Canadian matter up north.

I would request, if the Court please, that a protective order be entered which would insure that the documents the Court has ordered turned over, and the information derived therefrom, be made available to the U.S. Attorney's Office, to those investigators, to the grand jury, and not turned over to anyone else.

Judge Weinfeld entered a similar order under somewhat similar circumstances some time ago when the files of a labor union were subpoenaed by the grand jury.

THE COURT: It seems to me that if there is any sense to the requirement that grand jury proceedings are secret, it is only an ipse dixit that the secrecy should not be disclosed by the grand jury or the prosecutor or anybody connected with the disclosure that is being made here.

This is a criminal inquiry, is it not?

MR. MILLER: Thank you, your Honor.

THE COURT: Isn't that what you are asking for?

[17] MR. MILLER: Yes, sir, it is.

THE COURT: You don't disagree, do you, Mr. Schreiber?

MR. SCHREIBER: No, your Honor.

I told Mr. Miller before that if and when the Government intends to make any of this material available to the Canadians, we will make a Rule 60 motion requesting authority to disclose.

THE COURT: For all present purposes, the direction which I am making is related to furnishing data and information to the grand jury, for the grand jury's use.

I am not pulling anybody else's chestnuts out of the fire or ordering that this material may be published to anybody else.

If there is ground on which it can be published it will have to be separately established but as it stands now, compliance with the Order by the respondents in possession, as indicated by my direction, is intended to be and limited to the grand jury, its agents and the United States Attorney, and Assistants, with the full protection of the secrecy of grand jury proceedings, for all purposes not to

be disclosed, except on an independent proceeding requesting such disclosure and for proper cause shown.

[18] I can't anticipate what this will be but to that degree, you are entitled to the protection you ask.

Is that broad enough?

MR. MILLER: That is certainly satisfactory.

I assume I will see such motions——

THE COURT: I direct you receive notice of any use of the data in any way other than for grand jury.

MR. SCHREIBER: Judge Pollack, I have already represented that to Mr. Miller, that I would do that.

THE COURT: Then we are in agreement.

MR. SCHREIBER: I have no objection.

Thank you very much.

MR. HUNDLEY: Judge, may I bring up one other item? There is a parallel inquiry by the SEC down in Washington and I would like your Honor to permit some arrangement to be made between myself and Mr. Schreiber just to make the corporate documents available to the SEC in Washington.

MR. SCHREIBER: I have no objection.

Does Mr. Miller have any objection to that?

MR. MILLER: No, I certainly have no objection, The only thing I would point out, in addition to the SEC investigation, there is also an IRS audit underway, if the Court please, and they have been requesting many of these [19] documents also and I assume——

THE COURT: Let me put it this way. The delivery of the documents to the possession of the grand jury and its agents, the United States Attorney, is to be effected with the understanding that if other governmental agencies legally are entitled to require examination of the same material, that the grand jury and the United States Attorney will cooperate to make the material available on the request of the counsel who are before the Court.

MR. MILLER: Subject to the same restrictions?

THE COURT: Once it becomes available to the Securities

and Exchange Commission and somebody else, I don't have the same authority.

MR. SCHREIBER: If I may point out, Mr. Miller knows and Mr. Hundley knows that there are two inquiries going on in Canada. One is a Commission of Inquiry and one a criminal investigation by the Royal Canadian Mounted Police.

One is a legislative sub-committee inquiry and the other one a criminal prosecution.

It is my understanding the SEC is cooperating with the Commission of Inquiry up in Canada and if these records are made available to the SEC they may very well be made available to the Canadian authorities.

[20] THE COURT: Now you have warned them the extent to which they should make you——

MR. HUNDLEY: Your Honor, I have an understanding with the SEC they are not going to ship them to Canada. One of my clients is a gentleman by the name of Mallette.

There are a lot of documents in the records the grand jury has concerning Mallette. I have been advised that there is a sealed indictment against Mr. Mallette.

I am not concerned about the SEC, Schreiber, or the grand jury here because quite frankly you don't keep sealed indictments down here for nine months.

I just think it would be grossly unfair for the SEC or grand jury or anybody now to ship all of these Mallette personal papers up to the Canadians and the SEC has agreed they would not do that.

THE COURT: I don't see that there is anything further for me to rule upon.

MR. MILLER: Your Honor, I wonder if you might grant me a stay of three days so I can decide whether or not I should appeal. I don't believe so but——

THE COURT: Yes, this order shall become effective on Friday of this week, April 13th, 1973.

MR. SCHREIBER: Your Honor, I don't believe a denial of a motion to quash is appealable.

THE COURT: You can explain it to counsel.

APPENDIX F

Inventory of the Contents of Three 4 Drawer File Cabinets Formerly Located at 248 Lorraine Avenue, Office #4 Montclair, New Jersey

NOTE: The three cabinets have been delivered to the United States Attorney's Office, where they now remain. The following shorthand designations have been used to catalog the contents:

"L"—indicates the left most file cabinet.

"L #1"—indicates the first drawer in the left-most cabinet.

"E #1"—indicates the first envelope in the drawer.

S—indicates that Simon Horowitz did this part of the inventory.

E1S1—indicates the first document in the first envelope.

L1-E1

S1—Kasser Cash Book & Gen. Ledger 1967—51 sheets

S2—Kasser Journal & Cash Book 1965—25 sheets some blank sheets and 33 sheets—general ledger 1966

S3—Kasser Gen. Ledger 1965—44 sheets

S4—Black cover book—34 pages 1966 Kasser Journal—Receipts, Disbursements

S5—Various Corporate Charters, Minutes and Financial Data and Correspondence of the following corporations:

Polytechnic Organization Ltd.
Teshnopulp AG
Monoca AG
Churshill Forest Industries
Overseas Development Establishment
Sagea Anstalt
Technopulp Incorporated
151 sheets

S-6—Various invoices to Technopulp Machinery

S7—Papers relating to Technopulp property at 615 Valley Rd. upper Montclair, N. J.

S8—Traveling Expenses—Kasser

S9—Empty folder marked "Fees Income"
S10—Folder marked "Purchases" various purchase invoices for Technopulp machinery
S11—A. V. Koeppen 1966—Expense Account
L1E1
S12—Engineering Technical Services various invoices to Technopulp Machinery Inc.
S13—Sales Income 1966 Technopulp machinery various invoices 1966
S14—Folder marked "Misc." lists of Tech machinery invoices
S15—Selling expenses—various invoices
L1-E2
Invoices & backup material
Technopulp
Churchill Forest
Blue Construction
L1-E3
S1—I—Rec. from CFI & MP
II—Funds Rec. & Exp. w/ support sched
III—Obligations
S2—CFI P.O.'s Paid & unpaid
S4—CS Paid & unpaid
S5—Distribution of P.O.'s
L1-E4
S1—Alexander Kasser Will
Elisabeth Kasser Will
S2—3 stock certificates Symehronex Corp.
Elisabeth & Alexander Kasser
S3—Receipts for documents given to auditors—no indication who from
S4—Start up samples
S5—C.F.I. Burton Agreement
S6—Churchill Forest Balance sheet Jan. 31, 1971
S7—1964 Diary appointments memorandum no indication whose it is
S8—1964 Diary Wudermann
S9—1964 Diary no indication whose it is

S10—Deed of property to the Kassers
S11—4 blank checks drawn on CFI accounts
S12—Correspondence from Churchill Forest to Technopulp Incorporated—2 sheets
S13—Correspondence from Stephen Moshay to the Swiss Bank Corp. May 31, June 1, and June 4, 1971 (4 sheets)
S14—Correspondence re: Ted Bremer (Kasser) 7 sheets
S15—Promissory note from Stephen E. Holzel to Kasser
S16—Interoffice memo from Hilton to Horowitz
S17—4 interoffice memo from G.L. to Sett.
S18—Photostats copies of travel checks & invoices
S19—Photostats of invoices & checks—Kane Equipment Ltd. and Robbins Equipment Ltc.
L1-E4
S20—Letter from Churchill to Toronto Dominion Bank
S21—Mortgage on Kasser property
S22—2 letters to Kasser in Germany
S23—Miscellaneous
S24—Petty cash advances to Ziegler by corporation
S25—Kasser stock certificate
S26—Churchill limited material
S27—1965 Diary—no indication whose it is & pictures of machinery
S28—Technipulp documents re: MDC
S29—Letter from S. E. Mashary to Churchill Forest Industries
S30—Kasser letters re: Foundation
S31—Corporate checks & photostats
S32—Correspondence between Kasser & Brown Bros.—2 sheets letters Dec. 18, 1970 from Technopulp to John Wak (5 sheets)
S34—Correspondence from Bertram to MP Industrial Mills
S34—Trust Agreement between Kasser & his children
S27—CFI River Blue Documents
L1-E5
S1—B. V. Common Services—status of orders work sheets under clamps

S2—Distribution of Purchase Orders—work sheets under clamps

S3—Summary MP—Work sheets under clamps

L1-E6

S1—Code & Code Financial Statements 1966-67

S2—Empty folder marked "History of Companies"

S3—Churchill—Deferred Org. & Dev. Cost 1-31-67 (2 sheets —original & photostat)

S4—Folder marked "originals of documents (copies furnished to IRS 25 documents under staple—12 documents under paper clips

S5—"Extra Documents" folder containing copy of Form 959 filed by Kasser

copy of Form 959 filed by Radio Hill Investment Corporation for Siace
copy of Form 959 filed by Radio Hill Investment Corporation for Siace
Copy of Form 959 filed by Kasser for Saratoga
Copy of Form 2952 filed by Celanes for Radio Hill
letter from Kasser to Reiser

S6—Polytechnic—Financial statements Talag Finanz-Gesellschaf 1970 & 1969 (2 booklets)

Shareholders agreements, correspondence between corporation and Kasser—between Kasser & Chuldren various other Polytechnic documents

S7—Siace Celanese Participations—Roberts & Holland—Attorneys letters

S8—Kasser—Roberts & Holland

S9—Kasser Joel Mallin File

S10—Kasser Radio Hill

S11—Documents Received from or relating to Kasser Tax return back-up material re: Technopolp AG Overseas Development Establishment, Polytechnic, Canequip, code & code

L1-E6

S12—Siace—Foreign Corps. containing letters from Roberts & Holland—Kasser Tax information returns forms

—Celanes tax information return forms, and Celanese Correspondence and Siace data

S13—Kasser-Radio Hill letter from Roberts & Holland and papers re.: Siace—Radio Hill

L1-E7

S1—Kasser checks & bank statements First Natl. City Bank Jan. 1965-Dec. 1965—12 envelopes

S2—Technopulp Machinery checks & bank statements First Natl. City Bank—Nov. 1965-Oct. 1966—12 envelopes

S3—Technopulp Machinery Montclair Natl. Bank checks & bank statements Nov. 1965-Oct. 1966—12 envelopes

S4—Technopulp Machinery Inc. Bank of N.Y. checks & Bank statements Nov. 1965-Oct. 1966—12 envelopes

S5—6 Technopulp Machinery checks under paper clip of First Natl. City Bank

S6—Kasser 1965 Diary

S7—Folder marked 1965 Diary

L2-E1

S1—Photostats of checks & Bank statements of Blue Construction Co. Chem. Bank Aug 1968—thru Dec. 1969—17 envelopes

S2—Photostats as above Jan. 1970-June 1970—6 envelopes

S3—Photostats as above July 1970-Dec. 1970—6 envelopes

S4—Photostats as above Jan. 1971-Oct. 1971—10 envelopes

S5—Photostats of Blue Construction Co. checks & bank statements—Washington Trust Bank, April 1968-Jan 1969—10 envelopes

S6—Same as above Feb. 1969-Dec. 1969—11 envelopes

S7—Same as above Jan. 1970-Nov. 1970—11 envelopes

S8—Same as above Jan. 1971-May 1971—5 envelopes

S9—Photostats of Blue Construction Co. checks & bank statements Montclair Natl. Bank Apr. 1969-Nov. 1969 20 envelopes

L2-E1

S10—River Sawmills Co., photostats of checks and bank statements Washington Trust Bank

July, August, Sept. 1968
Nov. 1968, Dec. 1968, Jan. 1969

Feb. 1969
June 1969-Nov. 1970
Jan. 1971, Feb. 1971, Mar. 1971
May 1971
29 envelopes

S11—River Sawmills Co., Chemical Bank photostats of checks & Bank statements March 1969-July 1971—29 envelopes

S12—Same as above—River-Royal Bank Jan. 1969, Mar. 1969, Apr. 1969, Aug. 1969, Sept. 1969, Oct. 1969, Dec. 1969, Jan. 1970, Feb. 1970, Thru Dec. 1970—19 envelopes

S13—Same as above River Royal Bank & Trust Co. Oct., Nov., Dec., 1970—3 envelopes

S14—Various invoices Blue Construction and River Sawmills Co.

L2

Folders:

1—Kasser 1970 Tax Documents and information
2—Kasser Canequip File
3—Kasser Canequip Statement Tax Form 959 Code & Code Statement, letter to Churchill Pulp C/o Mochary & Mochary
4—Kasser Canequip File—tax Form 959—letters
5—Kasser 2952 Information for taxes
6—Technopulp Incorporated Chemical Bank, Book (with covers) Year ended Jan. 31, 1971; From 9-12-69 to 1-31-70—37 sheets
7—Technopulp Incorporated Chemical Bank Cash Book with covers 22 sheets many blank pages
8—Kasser—Swiss Bank Corp. file
9—Kasser's CD lists & Technopulp, Blue River
10—Kasser's CD lists & Technopulp, Blue

L2#

11—Check Book Churchill Pulp Mill Limited
12—Technopulp Inc. Invoices to Siace

13—Napoli Equipment—Atlantic Bank Letters
14—Napoli Equipment Co., Inc., to 10-31-67
15—Kasser—and his children's tax forms 959 IRS
16—Blue Construction agreement with Technopulp Machinery

Letter from Roth Carlson, attorneys
Letter to Chemical Bank
Unrelated photostats

17—Kasser tax papers and tax forms—receipts for extension—Kasser's children Blue Construction Extension form
18—Mallin—Mochary Time slips
19—Empty folder "Stephen Mochary"
L2-E2
S-1—Kasser's Montclair National Bank 1966 Checks Jan-Dec. eleven envelopes
S-2—Technopulp Company Kasser's 1966 checks Jan-Dec. 1966
S-3—Technopulp Company—Kasser's 1967 checks Jan-Dec 1967 12 envelopes
S-4—Kasser Montclair Bank checks—Jan thru Nov 1967 eleven envelopes
S-5—Kasser Montclair National Bank check—Jan-June 1966 6 envelopes

Same as above—July-Feb 1967 8 envelopes

L2-E3
S-1—Kasser 1969-2952 Tax information
S-2—Tax Check—Technopulp & Kasser
S-3—Churchill Technopulp A.G. Contract
S-4—Kasser 1970 tax information
S-5—Kasser 1969 Tax Return information
S-6—Kasser Interest Equalization Tax Returns
S-7—E. K. letters from Stephen Mochary, attorney and escrow agreements with Technopulp Incorporated and Technopulp Machinery.

S-8—Kasser—Brown Brothers—Statements—Bank Accounts
S-9—Kasser 1969 Tax Information—Technopulp Tax Return 1-31-70
S-10—Kasser First National City Bank Checks—November
S-11—Kasser 1969 tax information
L2-E4—Empty envelope
L2-E5
S-1—Chruchil Forest Industries

Work papers under clamp—top sheet loose from clamp

S-2—Bertram Verkaufs A.G.

Receivables from C.F.I. & M.P. at January 8, 1971
Work papers under clamp

S-3—CFI work sheets under clamps
L2-E6
S-1—Kasser General Ledger 1968 and 1969—Black Cover Book
S-2—Kasser cash book 1968 and 1969 and General Journal 1968 and 1969. Book with blue covers
S-3—History of Companies—Kasser Tax information re. 2952 forms Kasser 1099 forms 1966 and 1967 and 1968 Chemical Bank Checks April 1968, Apr. 1969 & July 1969
S-4—Technopulp Machinery—Tax Returns—Summaries of Income 1965
1964-1967
S-5—Kasser-Brown Brothers—Cancelled checks and summaries 1-1-68 to 12-31-69
S-6—Kasser Radio Hill-Celanese—Letters from attorneys and Legal Documents re: Sale & redemption of shares
S-7—Kasser 1968 tax return data
S-8—Kasser letters from attorneys and other tax information 1099 forms relating to Kasser-Radio Hill
Technopulp Incorporated 1-31-68 and 1-31-69 tax returns

S-9—Kasser Dividends and redemptions—Kasser-Radio Hall

L2-E7

S-1—Kasser-Chem Bank Checks

Jan-March 1968; May-Dec. 1968—eleven envelopes
Jan 1969-Mar. 1969; May 1969-June 1969;
Aug. 1969-Dec. 1969—ten envelopes
total 21 envelopes
Kasser First National City Bank Jan thru Dec. 1968 12 envelopes
Kasser First National City Bank checks Jan. thru Dec. 1969 12 envelopes
Kasser First National City Bank Check Jan Feb. Mar 3 envelopes

L3

1—Churchill Forest Industries—Work Papers 1-31-68

2—CFI agreements with Technopulp, Inc.

3—Blue River CFI status of accounts

4—CFI Trial Balance and Adjustments (Papers under clamp)

Bertram Verkaufs Funds Received and Expended on Pulp and Paper Mill Contracts (Papers under clamp)

5—Blue Construction—River Sawmills FDI forms filed

6—Blue—Spokane—Account Analysis

7—Technopulp Machinery—Bank Account Rec.—Brown Bros.

8—Northern Manitoba Timber Cutters Financial Statements 13-1-69

9—Churchill Forest and Subsidiary Consolidated Bal Sheet 1-31-70

10—Churchill Forest & Subsidiary Consolidated Bal Sheet 1-31-69

11—C.F.I. letters & documents

12—CFI & Subsidiary Financial Statement 1-31-69

13—CFI & Subsidiary Financial Statement 1-31-69

14—Northern Manitoba Timber letters financial statement 1-31-69
15—CFI Financial statements 1-31-67
16—CFI financial statements 1-31-68
17—CFI financial statements 1-31-68
18—CFI letters and documents
19—CFI copies of court documents
20—Bank Forms
21—Contract Blue-Technopulp Machinery
22—Kasser—Certificates of Deposit
23—Kasser Commerce Department Gov't tax forms FDI
24—Jasser Commerce Dept FDI forms filed containing tax informa
25—Kasser Commerce Dept Work Sheet FDI Forms filed containing tax information sheets
26—Schedule of Requisition Payments—CFI
27—Churchill—Financial Statements 1-31-67
28—CFI invoices
29—Common Services—American National Bank
30—CFI—Year Ending 1-31-70—Toronto Dominion Advices
31—Churchill Pulp Mill Ltd. Closing papers & documents 1-31-
32—C. P. Churchill Pulp Mill Ltd.
2 Chemical Bank Statements & other documents
33—C. P. Churchill Pulp Chemical Bank statements

Montclair National Bank 1 envelope 7/15/69 to 10/3/69 Chemical Bank Sept. 1969, Nov. 69, Dec. 1969; Jan 1970, thru Feb. 1971; April 1970 & May 1971—19 Statements

34—CFI minutes
35—Copy of Celanese A. Kasser Radio Hill contract
36—Chastek letter 1-8-71
37—Chemical Bank—Blue Construction
38—Chemical Resources Corporation
39—Chem Bank Check Book—Chemical Resources
40—Misc. Blue River

41—Kasser—Commerce Dept forms filed—correspondence with Commerce Dept. and letters from attorneys
42—Common Services Agreement
43—Commerce Department Forms (blank)
44—Blue Construction—work papers
45—Blue Construction Corp. summaries
46—Kasser—U.S. Tax Form 872
47—Technopulp Incorp. Tax Returns 1969
48—Tax Forms (Blank)
49—Tax extension requests—Kasser and corporations
50—Kasser—IRS question list re: Kasser tax audit
51—Fir Spruce Corp File I.M.K. and M.V. Mochary
52—Bertram Verkaufs agreements with Technopulp Machinery, Inc.
53—Blue Construction Co.—work papers
54—Churchill Pulp Mill—Commerce Dept. FDI 101 Forms filed
55—GP-CFI
56—Churchill Pulp closing 1-31-71
57—CPM tax returns (blank)
58—C.P. (blank file)
59—CPM bills
60—CPM Form 959
62—Two checks made out to A. Kasser
61—CPM work papers (personal)
63—Kasser will (personal)
64—Kasser invoices paid. Can't tell if personal or corporate)
65—Equalization refund for Michael Kasser
66—A. Kasser and E. Kasser 1024 tax forms (personal)
67—A. Kasser IRS forms 872 for 1968 (personal)
68—Kasser Chase Manhattan bank account (personal??)
69—A.K. 1972 tax data
70—A & E Kasser income tax returns (personal!?)
71—A & E Kasser IRS material
72—Blue River misc. papers
73—Correspondence from T.C. & L.
74—leases TPM

75—Letter to Kerekes from Simon Horowitz (?)
76—Partnership agreement—K & M Company
77—Dr. I. M. Kasser tax returns
78—Michael Kasser bank records
79—Technopulp Machinery documents
80—Bank letters from EK to First National City Bank
81—E Kasser bank account
82—Kennedy and Cabot papers (?)
83—A. Kasser First National City Bank acceptance bonds (?)
84—Blue Construction company loans
85—Blue invoices—paid
86—Legal correspondence from Trezona to Kasser
87—Statements of accounts—Blue Construction company
88—CFI—work papers
89—Kasser misc. loose papers
90—Kasser tax returns for 1968, 1969, 1970 and 1967

L4

1—AK General ledger—1970
2—Kasser foundation contribution
3—AK gift tax returns for 1972
4—AK advance to IMK, SEM & MVM
5—River, CFI, MDF notes
6—Miller-Cassidy invoices
7—Kasser—Montclair National Bank Statements
8—AK & EK shares records—Montclair National Bank
9—Stanley Millet personal papers
10—Steven and Mary Mochary 69 and 70 tax returns
11—invoice to B. W. Goldenberg
12—Mary Mochary bank records
13—Kasser patents
14—Kasser Power of Attorney
15—Kasser Racquet Club invoices
16—Technopulp bank account material
17—Overseas Development bank accounts
18—Kasser—personal bank accounts
19—1971 personal bank accounts—Kasser
20—River Sawmill company work papers

21—River Sawmill documents
22—River Sawmill documents
23—River Sawmill documents
24—Legal correspondence to Kasser
25—Legal invoices for Kasser
26—Personal bank account—AK—Royal Bank of Canada —$2,000.00
27—stock certificates—A & E Kasser
28—Stock certificates—A & E Kasser
29—Kasser bank records
30—Technopulp corporate documents
31—CFI and Technopulp corporate documents
32—Technopulp checks to Parke Beret Galleries for sculpture
33—Technopulp bank records and furniture & fixture records
34—Technopulp work sheets
35—Technopulp meeting minutes (7-71) resignations and installation of officers.
36—Paper purchase invoices—deposit slip
37—Loan advices re Technopulp and Blue Construction from Chemical Bank, New York Trust Company
38—Technopulp cash receipts for 1966 and 1967. Work sheets CFI and TPI
39—TMP invoices—paid
40—TP Franchise tax returns 1957-1971
41—TP meeting minutes of 8-2-71 and 7-9-71
42—New York State Corporation Franchise Tax Report re: Technopulp
43—Work papers re invoices from TP and CFI
44—Minutes of meeting on 7-9-71
45—Minutes of meeting
46—TPI—Franchise Tax Returns '52-'71
47—"Statement of Amount Paid or credited to Non-Residents of Canada" (Royal Bank of Canada) monies to TPI
48—TPI-work sheets—IRS extension to file tax return

49—TP—New Jersey and Federal tax returns for '68 and '69
50—TPI—balance sheets 11-69 to 9-70
51—TPM invoices from Browne Brothers Harriman
52—TPM—Browne Brothers Harriman bank invoices
53—TP—Bank reconcilation work sheets
54—Kasser stock certificates—Dr. Oskar Reiser credit advices
55—Kasser—travel expenses (personal ??)
56—Robbins Equipment Corporation—misc papers
57—Robins Equipment Corp.—misc papers
58—Misc papers re John Wark
59—Records of advances of TP/Expenses (File entitled Jack Wark account details)
60—Material sent Clarkson, Gordon (2 folders)
61—Kasser fund supervision and review request from White, Weld and Company
62—Misc records of credit advices re E. Kasser
63—TP—misc.
64—TP signature cards and corporate resolutions—invoices
65—Kasser bank records
66—Code and Code Inc. balance sheets
67—Code and Code (Canada) work papers
68—TP and A. & E. Kasser appraisal memos from H. Galka, Inc.
69—TP invoices from Mochary & Mochary and credit advices
70—TP minutes and resolution (one unsigned)
71—Blue River and TP correspondence
72—Kasser work sheets (personal??)
73—Mary Mochary nee Kasser stock information papers
74—Misc. correspondence
75—Misc. correspondence and work papers

MIDDLE CABINET

M-1
1—Misc. Journals '68-70
2—Misc. ledger

3—Receipts & disbursements beginning in '65
4—Misc Gen Ledger '68-'70
5—Misc. ledger
6—Technopulp General Ledger 2/1-6/15/69
7—River Sawmills Journal '68-71
8—River Sawmills Co. control account journal
9—Journal—no company name
10—General ledger, cash receipts and payables
11—Misc ledger
12—Technopulp—Blue Cash Book—CFI Journal—Fiscals 68-69 and 69-70
13—Technopulp—Blue Sub-Ledger (CFI & River)
14—Technopulp—Blue cash book—general ledger—Fiscals 68-69 and 69-70
15—Technopulp—Blue cash book—Journal—Fiscals 68-69, 69-70, & 70-71
16—Technopulp—Blue cash book—River—Journal Fiscal 69-70
17—Misc corporations correspondence and work sheets
18—Technopulp correspondence and work sheets—some some bank records
19—empty folder
20—Envelope re River; letter re "unaudited balance sheets"; Financial statements re River
21—Bank authorization to purchase and sell securities re Technopulp
22—Misc correspondence re CFI and invoices
23—Misc paid invoices (personal—Mrs. Kasser)
24—Kasser association invoices
25—Technopulp ledger sheets—Overseas Development Establishment Kasser income tax return work sheets
26—River documents from Chet in Abeyance
27—Blank folder
28—Canadian Superior Court Writ of Seizure before Judgment in the Hands of third parties
M-1
29—Technopulp taxes and work sheets
30—Technopulp travel invoices

31—blank file
32—blank file
33—Correspondence to Technopulp from Royal Bank of Canada (Directions from bank to company to invest, etc.)
34—Letter from Technopulp to CFI re: work performances and costs against prior billings (really general correspondence)
35—Kasser mail—blank file
36—Kasser payroll taxes—blank file
37—Kasser tax returns—blank file
38—Kasser tax returns
39—M. Kasser papers
40—Horowitz papers
41—Kasser papers from Depart. of Commerce
42—Kasser mortgage papers
43—blank file
44—legal fees—Kasser lawyers
45—blank file
46—legal bills to Kasser
47—Novak bills
48—CFI General ledgers
49—TP documents
50—TP documents
51—AK pension plans
52—AK real estate papers
53—bank accounts (CFI)
54—Horowitz papers
55—TPI earnings
56—income tax return forms
57—bank resolutions (TP)
58—TP corporate resolutions
59—Blue ledger
60—blank file
M-1
61—Churchill pulp documents
62—AK Chemical Bank statements
63—AK Chemical Bank statements & documents

64—EK letters
65—Churchill lease
66—Churchill credit reports
M-2
17 diaries (unknown) and misc. material in front of M-2
1—Blue bank reconcilation
2—Blue bills
3—Blue bill
4—Blue—blank
5—Blue invoices
6—Blue invoices
7—Blue invoices
8—Blue invoices
9—Blue invoices
10—Blue invoices
11—Blue invoices
12—Blue—blank
13—Blue invoices
14—Blue invoices
15—Blue invoices
16—Blue invoices
17—Blue invoices
18—Blue invoices
19—Blue invoices
20—Blue documents
21—Blue documents
22—Blue ledgers
23—Blue bank account reconcilation
24—CFI accounts
25—Blue invoices
M-2
26—Blue—blank
27—Pack River memo
28—Blue bills
29—Blue bills
30—Blue bills
31—Blue invoices
32—Blue misc. notes

33—TP agreement
34—TP-Simons contract
35—CFI Checks—blank file
36—Simons employment contract
37—RS legal correspondence
38—CFI—invoices
39—CFI accounting statement
40—CFI—blank file
41—CFI balance sheets for '70
42—CFI correspondence
43—RS bank ledger
44—Blue Invoice—blank file
45—Canadian tax returns—blank file
46—Blank letterheads
47—Lloyd Hale expense sheets
48—Alan Gall work sheets
49—TP—invoices
50—Corporate tax returns
51—Blue invoices
52—TP bills
53—CFI invoices
54—Brokers statements—CFI
55—CFI inquiry from Betts
56—CFI balance sheets
57—CFI receipts and disbursements sheets

M-3

1—Brown file—TP General ledger and receipt & disbursement Journal
2—TPM bank statements
3—E. Kasser and TP bank statements
4—CFI authorization, engineering invoices, requisitions shares data

Six blank check books for CPI, TP, Napoli, E. Kasser, Gem Cliff and Blue Construction Co.
Three diaries
Three packages of bank statements for A. Kasser (2) and Napoli Equipment (1)

M-4

Nine packages complete misc bills, newspaper clippings, etc.

Two packages bank statement from Chemical Bank . . . both to A. Kasser and/or E. Kasser.

Two blank check books for TP Machinery with work papers attached in front on each one.

Two general ledgers for A. Kasser

One brown briefcase full of completely misc. Kasser papers

One black box containing blank stock certificates for TP. TP certificate of incorporation. Corporate records. Blank stock certificate and transfer ledger book. Minutes of TP meeting. Check stub book, and totally misc. papers. TP Construction Company seal.

RIGHT CABINET

Front of Top Drawer

Two packages of N. J. Bell long distance tlep. bills.

One package of tax material

One pak of AK and EK stock certificates-Audiskan Company

One National Newark and Essex Statement for E. Kasser

1 package of State of New Jersey Department of State Annual Reports to A. Kasser, TP, Hillside Egg Company. Napoli Equipment and Electric Sales

One package of Statement to A Kasser from American National Bank and Trust Company

Two red corporate record books of Kasser and Kasser, Inc. and Kasser and Associates, Inc.

R-1-1—Millet—blank file

2—Jacksonville Harver—Blank file

3—K & M—blank file

4—Kasser bank statements for the Royal Bank of Canada

5—Napoli Equipment co. tax returns

6—SIACE Stock correspondence to Kasser

7—TP—work sheets

8—blank file

9—Churchill Canadian Census reports
10—Commerce Department FDI instruction
11—Delaware tax forms
12—Memo of agreement for common services joint venture and related papers
13—Churchill MP documents
14—Churchill balance sheet and related document re Pas
15—Churchill insurance documents
16—Churchill correspondence to M.D. re Pas Project
17—Churchill re: Area Development Grant
18—River Sawmill and TP agreements
19—Legal correspondence re: River Sawmills
20—Blue Construction Co correspondence
21—TPM—blank file
22—TP work papers re: expenses accounts
R-1
23—Legal opinion re: timber contracts
24—Department of Commerce Bureau of Census survey of TP
25—Blue Construction Co documents
26—Browne Brothers statements to A & E Kasser
27—blank file
28—SIACE invoices
29—SIACE invoices
30—work papers—invoices (?)
31—Commerce Department forms
R-2
1—T Pfranchise tax returns; TP work papers in connection with TP payroll taxes
2—Kasser and Associate Inc tax file; TP franchise tax return Napoli Equipment Co tax return; Napoli Equipment Co work papers in connection therewith.
3—Insurance application for bonds for TP
4—A Kasser trademark and patent applications and correspondence related thereto
5—Blue River contract—status reports
6—Technopulp and Blue Construction Company sub-ledger balance sheets

7—IRS Forms and books for A Kasser
8—Misc. bills for Mr. & Mrs. Kasser
9—Investment credit forms
10—Blue Construction Company bank reconcilation papers
11—Blue Construction Company bank reconcilation papers
12—TPM work papers
13—TPM cash books 65-68
14—TP work papers
15—TP franchise tax returns
16—TPM checks and related correspondence
17—TP work papers and State of New Jersey and IRS tax material
18—TP work papers
19—TP Federal income tax returns
R-2
20—TP correspondence to TP engineers in Spain
21—TP consulting engineers billings from H. A. Simons
22—Bills for E. Kasser's Spanish apartment
*24—Saskatchewan Pulpwood balance sheets
*23—TP invoices
25—Memo of agreement—CFI and TPM
26—Purchasing and payment procedures for TP
27—A Kasser income tax work papers for 1965
28—A Kasser—work papers for taxes for 1964
29—A Kasser—'63 work papers
30—Churchill sales and excise tax correspondence
31—Income tax returns—Northern Manatoba Timber Corporation income tax returns and related documents
32—Legal correspondence to Mochary from Thompson Dilts & Co.
33—Blue Construction Company—TP deposit slips
R-3
1—Blue Construction Company correspondence with Chastek
2—Churchill tax feasibility account
3—Krumm invoices
4—Minutes of TPM meeting
5—Kerekes invoices

6—TP work papers
7—A Kasser tax work papers (1967)
8—TP and A Kasser Invoices
9—SIACE invoices and related memorandum
10—Memo to file and correspondence—not clear who from
11—TP State of New Jersey tax returns and MK dividend returns
12—AK—blank file
13—Professional bills to A. Kasser
14—Information returns—foreigns corporations—TP
15—A. Kasser tax work papers for 1968
16—A. Kasser—blank file
R-3
17—A. Kasser tax papers for 1968
18—Tax papers for A. Kasser and Steven & Mary Mochary
19—A. Kasser—blank file
20—Mochary—blank file
21—Mary Mochary—dividend tax forms
22—A. Kasser—dividend tax forms
23—A. Kasser—photo copy of Treasury check for $502.02
24—"For E. Kasser to File"—blank folder
25—"Government Forms to be Invoiced"—blank file
26—I. M. Kasser—blank file
27—AK—BWG—blank file
28—Banco Commerciale Italiana—blank file
29—Darlin—blank file
30—Bank statements—blank file
31—Family Foundation papers—blank file
32—Kasser and Kasser, Inc.—blank file
33—Kasser and associates—blank file
34—Certificates of deposits—American National Bank for TP
35—Kasser & Associates—blank file
36—TP tax returns—blank file
37—TRM, Inc.—blank file
38—"Reports to be Filed"—blank folder
39—Kasser and Kasser—blank file
40—"Confidential Follow-Up"—blank file

41—New Jersey Corporate tax returns
42—NYC tax return forms
43—CFI—Common Services Interests
44—AK payroll tax returns and work papers for 1958
45—AK payroll tax returns and work papers for 1962
46—E. Kasser tax work papers for 1959
47—A Kasser '62 tax work papers
48—TP payroll tax returns for 1967
R-3
49—TO—work papers '62-'64
50—TP—balance sheets for 1965
51—TP—blank letterheads and envelopes
52—TP—balance sheets for 1958
53—A Kasser misc deduction work papers
54—AK—invoices
55—SIACE invoices and TP
56—Napoli Equipment company payroll taxes
56—TPM, Inc. work papers 57-62
58—TP bank statements for the First National City Bank of New York and related documents
59—'63, '64, & '65 EK and AK checks, bank statements and related material
60—'65 legal bills and consulting bills to A. Kasser
61—Misc personal bills (paid) for A. Kasser
62—E. Kasser brokers statements for '57, '58 and '59
63—Petty cash slips for '65
64—Radio-Celanese contract
65—Notes for employers about New Jersey unemployment disability programs
66—Commerce Department forms—FDI
67—Commerce Department forms—FDI
68—Commerce Department forms—FDI
69—Commerce Department forms—FDI
70—Commerce Department forms—FDI
71—Commerce department forms and related documents
72—Petty cash slips for 1967
73—Package of total misc. material
74—AK travel material

75—Blue Construction Company check book and some entries
R-4
R-4-1—Atlantic Highlands General ledger
Two corporate seals—1 blue and 1 maroon
R-4
One TP Minutes and By-Laws book
Three stock certificate books—2 for TP and one for Pulp Paper and Equipment Company
Three stock and transfer ledgers—blank
One 1956 and 1957 general journal
One 1962 AK check book on First National City Bank and corresponding check stubs—some have entries some don't
One K & M Co check book—no entries
One EK check book—no entries
One 1964 work record book
One River Sawmills check book with some stub entires
One AK (1966) check book on the First National City Bank with some stub entries
One 1968 complete AK check book with stub entries
One 1964 check book on First National City Bank. All used but one check
One blank check book on the Montclair National Bank & Trust Company
One blank check book of TP on Chemical Bank
One Bertram Verkaufs—AG of debt advices
One River Sawmills 69 and 70 ledger
One River Sawmills 69 and 1970 Journal
R-4-2—Photos of time deposits with Royal Bank of Canada and related work papers
R-4-3—Bertram-Verkaufs—AG journals
4—Same as R-4-3
5—Commerce Department FDI literature
6—AK travel bills etc material for 1969
7—AK travel bills etc
8—Certificate of incorporation and related documents for Kasser and Kasser, Inc.
9—A Kasser travel bills for 1968

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TO Simon Horowitz
GREETING:

WE COMMAND YOU that all business and excuses being laid aside, you appear and attend before the GRAND INQUEST of the body of the people of the United States of America for the Southern District of New York, at a District Court to be held at Room 1401 in the United States Courthouse, Foley Square, in the Borough of Manhattan, City of New York, on the 2nd day of August 1972, at 10 o'clock in the forenoon, to testify and give evidence in regard to an alleged violation of 18 U.S.C. § 371.

and not to depart the Court without leave thereof, or of the United States Attorney, and that you produce at the time and place aforesaid the following:

The contents of all three file cabinets at 248 Lorraine Avenue, Upper Montclair, N. J., Office #4.

And for failure to attend and produce the said documents you will be deemed guilty of contempt of Court and liable to penalties of the law.

DATED: NEW YORK, N.Y. July 28, 1972

/s/ JOHN LIVINGSTON
Clerk.

/s/ WHITNEY NORTH SEYMOUR, JR.
United States Attorney for the
Southern District of New York.

NOTE: Report at Room 413. In order to secure your witness fees and mileage, it is necessary that you retain this Subpoena and present the same at the United States Attorney's Office, Room 413, upon each day on which you attend Court as a witness.

Assistant /s/ JAMES SCHREIBER Room 450
264-6447

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TO MR. SIMON HOROWITZ
275 Madison Avenue
New York, N. Y. 10016
GREETING:

WE COMMAND YOU that all business and excuses being laid aside, you appear and attend before the GRAND INQUEST of the body of the people of the United States of America for the Southern District of New York, at a District Court to be held at Room 1401 in the United States Courthouse, Foley Square, in the Borough of Manhattan, City of New York, on the 28th day of July 1972, at 10:00 o'clock in the forenoon, to testify and give evidence in regard to an alleged violation of Section 371, Title 18, United States Code,

and not to depart the Court without leave thereof, or of the United States Attorney, and that you produce at the time and place aforesaid the following:

(1) All records in connection with the Canequip Export, Ltd. and Alexander & Elisabeth Kasser.

(2) All records relating to any and all related corporations or to any corporations owned or controlled by Alexander or Elisabeth Kasser.

(3) All correspondence relating to (1) and (2) above.

(4) Copies of the tax returns of Alexander & Elisabeth Kasser for the years 1967-1971.

(5) All memoranda relating to (1), (2), (3), and (4) above.

(6) The contents of safedeposit box #5389, Morgan Guarantee Trust, over which Simon Horowitz has power of attorney and is attorney in fact.
7/27/72 (7) All correspondence with Marion Tannier.

And for failure to attend and produce the said documents you will be deemed guilty of contempt of Court and liable to penalties of the law.

DATEDS NEW YORK, N.Y. July 26, 1972.

/s/ JOHN LIVINGSTON
Clerk.

WHITNEY NORTH SEYMOUR, JR.
United States Attorney for the
Southern District of New York.

NOTE: Report at Room 450. In order to secure your witness fees and mileage, it is necessary that you retain this Subpoena and present the same at the United States Attorney's Office, Room 450, upon each day on which you attend Court as a witness.

Assistant JAMES SCHREIBER Room 450
Tel: 264-6447

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1712

IN RE GRAND JURY SUBPOENA SERVED UPON SIMON HOROWITZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners Alexander and Elizabeth Kasser seek review of the application by the court of appeals of the principles of *Couch* v. *United States,* 409 U.S. 322, to the facts of this case.

A federal grand jury in the Southern District of New York is investigating a complex series of international financial dealings to see whether federal statutes governing the use of the mails or channels of interstate or foreign commerce for fraud have been violated. In moving before the district court to quash a grand jury subpoena *duces tecum* served on their accountant, Simon Horowitz, for certain records he had stored in an out-of-state location, the claimants of the records (petitioners herein) contended that the subpoena was overbroad, that production of the records by their accountant would violate the attorney-client privilege, and that his disclosure of the papers would offend their privilege against self-incrimination. The contentions

were rejected in the district court, and on appeal the Court of Appeals for the Second Circuit, in a lengthy opinion by Chief Judge Friendly (Pet. App. 1a-28a), ordered the subpoena modified in certain respects but rejected the two privilege contentions.

Although the opinion of the court of appeals, upon which we rely (Pet. App. 19a-23a), fully answers petitioners' sole claim here—that the subpoenas directing the production of documents by a third party violated their privilege against self-incrimination—we direct the Court's attention to the following facts, which show that the case is now moot: On June 25, 1973, petitioners' application to this Court for an order staying enforcement of the subpoenas (Application A-1273) was denied.[1] The records subpoenaed have now been produced and are in the hands of the grand jury. As petitioners conceded in their application for a stay: "Enforcement of the subpoenas will moot the petition" (Application for Stay, p. 8). See, also, *United States* v. *Lyons*, 442 F. 2d 1144 (C.A. 1).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1973.

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[1] Mr. Justice Douglas and Mr. Justice Brennan indicated that they would have granted the stay. The application for a stay was filed at the same time as the petition for a writ of certiorari.

DOJ-1973-08

FILE COPY

SEP 6 19

MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

October Term, 1973

No. 72-1712

IN RE
GRAND JURY SUBPOENA SERVED UPON
SIMON HOROWITZ

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITIONERS' REPLY MEMORANDUM

HERBERT J. MILLER, JR.
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Attorneys for Petitioners

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

October Term, 1973

No. 72-1712

IN RE

GRAND JURY SUBPOENA SERVED UPON
SIMON HOROWITZ

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITIONERS' REPLY MEMORANDUM

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1. The Government in its opposition states to this Court that "the records subpoenaed have now been produced and now are in the hands of the Grand Jury." This representation is not correct since certain of the subpoenaed records are now impounded

and their disclosure to the Grand Jury depends on various factors, including, of course, the validity of the order appealed from.[1] Thus, Judge Pollack's order dated June 25, 1973, on remand, provides that documents which came into existence prior to January 1, 1966 need not be disclosed unless the Government makes a "minimal showing that, in light of other evidence that has been obtained, the documents may be relevant to the Grand Jury's investigation . . . ." (Appendix A, p. 2a, *infra.*) The order further provides that "all the papers shall remain impounded for such reasonable time as may be needed for completion of the Grand Jury's inquiry . . . ." Pursuant to the provisions of this order, counsel for both sides segregated out all records prior to January 1, 1964, pending a Government showing of relevance. See also Pet. Cert., pp. 13a-14a. Since these and other documents remain impounded by the Government and have not been turned over to the Grand Jury, the case of *United States* v. *Lyons,* 442 F.2d 1144 (C.A. 1, 1971) —relied on by the Government to show mootness—is inapplicable.[2] Indeed, under *United States* v. *Lyons*

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[1] We note, in any event, that if the suggestion of mootness were correct, the proper disposition of this case would be to grant the writ of certiorari, vacate the judgment below, and order further proceedings in light of the present status of the parties. *See United States* v. *Munsingwear,* 340 U.S. 36, 39 (1950); Stern & Gressman, *Supreme Court Practice,* § 5.13 at p. 226 (4th ed. 1969).

[2] It is true, as the Government states in its brief in opposition, at page 2, that petitioners, in their application for a stay in this Court, at page 8 thereof, stated that: "Enforcement of the subpoenas will moot the petition." That statement, however, presumed full enforcement of the subpoenas requiring turnover of *all* documents; obviously, partial enforcement of the subpoenas cannot moot the petition.

itself, 442 F.2d 1145, as well as this Court's decision in *S.E.C.* v. *Medical Comm. for Human Rights,* 404 U.S. 403, 406-07 (1972) there is clearly the requisite continuing controversy over the Government's access to those documents not turned over to the Grand Jury to support this Court's jurisdiction.[3]

2. On the merits, the Government simply relies on the opinion below. This is, however, inconsistent with the Government's attempts to "factualize" this petition by characterizing it as seeking "review of the application by the Court of Appeals of the principles of *Couch* v. *United States,* 409 U.S. 322, to the facts of this case." Brief in Opp., p. 1. Judge Friendly squarely recognized that "the facts of this case" inescapably pose the central doctrinal issue underlying this Court's Fifth Amendment jurisprudence running from *Boyd* v. *United States,* 116 U.S. 630 (1886) through *Couch* v. *United States,* 409 U.S. 322 (1973) —*i.e.*, whether privacy is a constitutional policy protected by the Fifth, as well as the Fourth Amendment.

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[3] Regarding those documents that have been turned over to the Grand Jury, the Government has recently filed a motion under Rule 6(e), Fed. R. Crim. P., to permit "The Royal Canadian Mounted Police (RCMP) access to certain documents subpoenaed by the grand jury in order for the RCMP to assist the Grand Jury's investigation." Horowitz and petitioners have opposed this motion with affidavits and exhibits showing, *inter alia*, that the Manitoban authorities have: (a) previously acted illegally in the United States to get information to support *post hoc* the expropriation without compensation of the Forestry project in Manitoba, (b) undertaken arrangements with private American civil litigants suing respondents to utilize the Federal Rules of Civil Procedure to get compulsory discovery for the benefit of proceedings commenced by the Manitoban authorities. The court has indicated it will grant a protective order preventing dissemination of grand jury documents.

Judge Friendly's opinion squarely addresses that much debated question because "the facts of this case" compelled him to do so, and he holds simply and clearly that privacy is not a part of the Fifth Amendment. See Pet. Cert., pages 24a-26a. It is obvious from reading this Court's decision in *Couch* v. *United States, supra,* that this Court so structured its decision to reserve that crucial constitutional issue until presented with a record which appropriately demands its resolution. This is that record.

Illustrative of confusion in the lower courts on this constitutional issue is the Fifth Circuit's recent decision in *United States* v. *White,* 477 F.2d 757 (1973), wherein the Court held that under *Couch,* records given to a taxpayer's lawyer, pursuant to the attorney-client relationship with respect to an on going criminal tax investigation were not privileged on self-incrimination grounds because the requisite "personal compulsion" was lacking. The majority in *White* relied for its conclusion on the facts that the records were not owned by the taxpayer and were not turned over to the attorney by the taxpayer. 477 F.2d 757, 763; *see also* Judge Ainsworth's dissent at 477 F.2d 766. Under those criteria, the Fifth Circuit would have had to recognize the Fifth Amendment claim asserted here by petitioners. *White* thus illustrates the basic conflict in principle among the Second, Fifth, Seventh, and Ninth Circuits with regard to the fundamental privacy issue left open by this Court's ambiguous rationale in *Couch.* See Pet. for Cert., pp. 21-27. See also *United States* v. *Blank,* 459 F.2d 383, 386-87 (C.A. 6, 1972).

For the reasons stated, the case is not moot and the petition for certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioners

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter

of

A Grand Jury Subpoena Duces Tecum Served upon Simon Horowitz, an Accountant.

ORDER

72 Misc. M-11-188

Upon the motion papers submitted by Herbert J. Miller, Esq., Counsel for Alexander Kasser and William Hundley, Esq., Counsel for Simon Horowitz, to quash a grand jury subpoena duces tecum served upon Simon Horowitz, an accountant, and upon the motion papers submitted in opposition by James Schreiber, Assistant United States Attorney;

Upon, the testimony given by Simon Horowitz, and an attorney named Joel Mallin, Esq., at a hearing held on March 21, 1973; and

Upon the decision of the Court of Appeals rendered June 8, 1973 affirming this court's decision in part and modifying said decision in part;

It Is Hereby Ordered that Simon Horowitz and Joel Mallin, Esq. forthwith turn over to the Grand Jury, the United States Attorney or any agent of the United States designated by the United States Attorney, the entire contents of the three file cabinets previously located at office No. 4, 248 Lorraine Avenue, Montclair, New Jersey, with the following limited exceptions:

a. The personal wills of Alexander and Elizabeth Kasser

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1712

IN RE GRAND JURY SUBPOENA SERVED UPON SIMON HOROWITZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The petition for a writ of certiorari in this case challenges a holding of the Court of Appeals for the Second Circuit rejecting petitioners' claim that the production of subpoenaed documents would violate their privilege against self-incrimination. On June 18, 1973, petitioners filed an application for a stay, which asserted that "a denial of this application will not merely work irreparable injury on petitioners' Fifth Amendment rights, but will also entirely moot the certiorari petition and defeat the jurisdiction of this Court" (Application A-1273, p. 6).

The application for a stay was denied on June 25, 1973. After being advised by the United States Attorney that the subpoenaed documents had been turned over to the grand jury, and accepting the accuracy of the representation made to the Court in the stay application, we directed the attention of the Court to petitioners' suggestion that the denial of the stay would "entirely moot" the petition for certiorari. Petitioners now argue

in their Reply Memorandum that the denial of the stay has not rendered the petition "entirely" moot. They rely on the fact that a certain group of pre-1966 documents were not required to be turned over to the grand jury immediately, but require further application to the district court.

After receiving the Reply Memorandum, which abandoned altogether the mootness suggestion advanced by petitioners when seeking a stay, we again communicated with the United States Attorney. He advises that petitioners' representation regarding the pre-1966 documents is correct, and that it is very likely that the grand jury may seek to examine these documents. Accordingly, it now appears that the issue is not, and was never, in danger of being "entirely moot."

In the circumstances, we no longer contend that the case is moot. We still urge, however, for the reasons stated in Chief Judge Friendly's opinion, that the decision below is correct and that the petition should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1973.

DOJ-1973-09

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1712

IN RE GRAND JURY SUBPOENA SERVED UPON SIMON HOROWITZ

PETITION FOR REHEARING

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1712

IN RE GRAND JURY SUBPOENA SERVED UPON SIMON HOROWITZ

PETITION FOR REHEARING

Petitioners hereby move this Court for reconsideration of this Court's order of October 9, 1973 denying the petition for a writ of certiorari in this case upon the following ground:

On October 15, 1973 this Court granted certiorari in the case of *Bellis* v. *United States,* No. 73-190. The single issue there presented for review was whether a former partner in a dissolved law partnership was correctly held not entitled to invoke the Fifth Amendment privilege against self-incrimination as a ground for refusing to produce business records maintained by the partnership while he was a member, where such records had come into his possession after the dissolu-

tion. A ruling in favor of the petitioner in that case could not turn on the happenstance of physical possession of the partnership's records in his hands as opposed to one of the firm's other former partners or employees. Ultimately, the issue posed in *Bellis* is whether there exists a Fifth Amendment interest in the records themselves on the theory of a legitimate expectation of privacy under *Couch* v. *United States*, 409 U.S. 322 (1973). That is the same fundamental issue presented in this case, and a disposition favorable to the petitioner in *Bellis* necessarily would affect the lower Court's rationale for rejection of the Fifth Amendment claim in this case.

Petitioners respectfully suggest that it would be appropriate to set their case for argument with the *Bellis* case.

Respectfully submitted,

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Certificate of Counsel

I hereby certify that this petition for rehearing is presented in good faith and not for purposes of delay. I further certify that the petition for rehearing is restricted to the above stated ground.

HERBERT J. MILLER, JR.